**PUBLIC VERSION**

**Before the**
**COPYRIGHT ROYALTY JUDGES**
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**Washington, D.C.**

| | | |
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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS** | ) | **Docket No. 2005-1 CRB DTRA** |

# RADIO BROADCASTERS' REPLY TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW


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December 20, 2006

**REDACTION LOG FOR**
**RADIO BROADCASTERS' REPLY TO SOUNDEXCHANGE'S**
**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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December 20, 2006

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## INTRODUCTION

Radio Broadcasters[1] respectfully offer this reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law ("SX's or SoundExchange's Findings and Conclusions"). Many of SoundExchange's Proposed Findings confirm the facts advanced by Radio Broadcasters in Radio Broadcasters' Proposed Findings of Fact and Conclusions of Law ("Broadcasters' Findings and Conclusions") and in the Joint Proposed Findings of Fact and Conclusions of Law Submitted by the Digital Media Association and its Member Companies and Radio Broadcasters (the "Joint D-RB Findings and Conclusions) (Collectively, "Broadcasters' Opening Findings and Conclusions").[2] Elsewhere, SoundExchange significantly misstates the facts and mischaracterizes the relevant law.

Radio Broadcasters address the most important of those misstatements and mischaracterizations in these Reply Findings and Conclusions (Broadcasters' Reply Findings and Conclusions").[3] However, in many cases, a complete response to SX's Findings and Conclusions is contained in Broadcasters' Opening Findings and Conclusions, and Broadcasters will rely on their Opening Findings and Conclusions.

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[1] Radio Broadcasters are Bonneville International Corp., Clear Channel Communications, Inc., Susquehanna Radio Corp. and the National Religious Broadcasters Music License Committee. Radio Broadcasters are described in Part II of Broadcasters' Proposed Findings and Conclusions.

[2] Broadcasters' Findings and Conclusions, filed December 12, 2006, are cited herein as RB PFF and RB PCL, respectively. Joint D-RB Findings and Conclusions, filed December 12, 2006, are cited herein as Joint D-RB PFF and Joint D-RB PCL, respectively. SX's Findings and Conclusions, filed December 12, 2006, are cited herein as SX PFF and SX PCL, respectively.

[3] Broadcasters' Reply Proposed Findings of Fact from this document are cited herein as "RB-RPFF." Reply Proposed Conclusions of Law from this document are cited herein as "RB-RPCL."

As Radio Broadcasters demonstrated in the Joint D-RB Findings and Conclusions and Broadcasters' Findings and Conclusions, SoundExchange's fee case with respect to AM/FM Streaming depends upon two key propositions:

a. The fee should be based on a non-competitive hypothetical market in which the record companies exercise supra-competitive market power; and

b. AM/FM Streaming should be subject to the same fee (in both structure and amount) as Internet-only webcasting despite the overwhelming, uncontested differences between the two types of services, including indisputable and undisputed differences in (i) the business and usage model (one channel programmed for over the air), (ii) the ability of Radio Broadcasters to reach their audiences without streaming, (iii) the promotional benefit to the record companies, (iv) the risk of substitution of CD sales, (v) the number of songs per hour, and (vi) relative importance of music and non-music programming contributions.

SoundExchange's Findings and Conclusions provide stark confirmation of its reliance on these two key propositions. It must prevail on both of these propositions in order for its fee proposal to be valid.

a. SoundExchange's Proposed Conclusions reject the requirement of a competitive market, *e.g.,* SX PCL ¶¶ 7-10, and its Proposed Findings barely pay lip service to the presence of competition, arguing instead that the record companies should be entitled to exploit their highly concentrated market power, and modeling its fee proposal alternately on (i) 17 license agreements between the four major record labels and five

services with business plans that indisputably required licenses from all four, and (ii) a speculative split-the-surplus model that is incompatible with a competitive market and that awards to the record companies virtually all of the surplus generated a business created by webcasters, in which webcasters bear all of the risk.

b. SoundExchange's Proposed Findings and Conclusions admit, and indeed repeatedly rely upon, the differences between AM/FM Streaming and Internet-only webcasting to make its case against Internet-only webcasting, only to turn around and argue that those differences are irrelevant to the price charged to AM/FM Streaming.

It should prevail on neither front. The requirement of a competitive market, discussed in Joint D-RB PCL Part I.B, is addressed in Part I, below. SoundExchange's reliance on supra-competitive fee models, addressed in Joint D-RB PFF Part III, is addressed in Part I, below.

In addition, SoundExchange's case with respect to AM/FM Streaming depends upon a host of subsidiary issues, all relied upon by SoundExchange in its Proposed Findings of Fact and Proposed Conclusions of Law. These have been addressed in Radio Broadcasters' Opening Findings and Conclusions and many are addressed below.

SoundExchange's Conclusions of Law also demonstrate the fundamentally flawed premises from which its case proceeds. SoundExchange bases its case on multiple significant mischaracterizations of the Webcasting I ("Web I") decisions, including:

- Contrary to SoundExchange's assertions, *see* SX PCL ¶¶ 6-28, Web I confirms the requirement of a hypothetical market that is a competitive market. The CARP rejected only one model of competition (competing collectives licensing the same

catalogs) in favor of identification of the willing sellers as record companies. The CARP and Librarian both made clear, however, that the hypothetical market must be one in which those record companies compete, and that it would reject any benchmarks based on supra-competitive bargaining power.

- Contrary to SoundExchange's assertions, *see* SX PCL ¶¶ 48-63, Web I was not a rejection of the musical works benchmark as a matter of law or for precedential purposes. While SoundExchange is quick to quote the CARP, it ignores the decision of the Librarian on review. The Librarian made clear that the musical works benchmark, which is far from "novel," (SX PFF ¶¶ 434, 437, 484), is an acceptable benchmark, but the CARP was entitled to select another.

## RADIO BROADCASTERS' REPLY TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT

### I. SOUNDEXCHANGE'S FEE MODELS DEPEND ON SUPRA-COMPETITIVE MARKET POWER.

1. SoundExchange does not disguise the fact that it is relying in this case on the market power of the major record companies derived from their consolidation of hundreds of thousands of copyrights into four very large hands. *See* SX PFF ¶¶ 177, 178 ("Dr. Pelcovits does not believe the Court should attempt to construct a hypothetical market characterized by a level of competition greater than that which exists in current music markets."); SX PFF ¶ 583 (Dr. Brynjolfsson concludes that the "labels would receive between 65 and 85 percent'" of the available surplus from the operation of webcasting businesses); SX PCL ¶¶ 16, 20 (arguing it is "established as a matter of law that the willing seller is the existing record companies" regardless of whether they operate in a competitive market).

2. SoundExchange admits that its fee proposal is based on Dr. Pelcovits' benchmark analysis of 17 agreements between the major record companies and five services. SX PFF ¶¶ 229, 1376.

3. SoundExchange, which advances that benchmark, fails to point to any affirmative evidence that the market in which those agreements were negotiated – the market for sound recording licenses for interactive digital music services – is competitive. Rather, they cite Dr. Pelcovits as finding that "the recording industry as a whole. . . is not characterized by monopoly power." SX PFF ¶ 190.

4. That proposition as discussed in the Joint D-RB Proposed Findings and Conclusions, Joint D-RB PFF Part III.B.2, is at best a questionable proposition, given the concentration in the industry and the history of interdependent conduct.

5. But more fundamentally, it is the wrong question. Dr. Pelcovits does not rely for his benchmark on the "recording industry as a whole." SX PFF ¶ 190. SoundExchange makes precisely this point in criticizing Dr. Jaffe for citing an FTC decision related to CD prices as a "decision by the FTC . . . unrelated to the market for interactive music services." SX PFF ¶ 312. SoundExchange is trying to have it both ways.

6. In any event, Dr. Pelcovits bases his analysis on 17 very specific agreements with five specific services in one very specific market. Nowhere does SoundExchange point to any evidence that the five services on which he relied needed an agreement with every major label in order to operate their business. Nor does SoundExchange point to any evidence that any interactive service providing a broad-based offering could survive in the market without licenses from all four major record companies.

a. SoundExchange claims that Dr. Jaffe has not studied the market to know whether the belief by a webcaster that it needs the portfolios of all four major record companies is correct or rational. SX PFF ¶¶ 200, 304. But, with respect to the market for licenses to interactive services, Dr. Jaffe was relying on both the testimony of the webcasters (*id.* ¶ 200), and the uncontested testimony of SoundExchange witnesses Lawrence Kenswil, a major record company executive, and Dr. Pelcovits. Jaffe WRT at 4-5 & n. 3, citing Kenswil Dep. Tr. at 71:7-18, 6/7/06 Tr. 67:12-68:5 (Kenswil), 5/15/06 Tr. 118:18-119:5 (Pelcovits). He further relied on Dr. Pelcovits' own concession that in licensing to the interactive services market "the record labels do not compete on the basis of price." Jaffe WRT at 6 (citing 5/15/06 Tr. 143:13-144:3, 172:13-20, 177:13-20). In the face of undisputed testimony from SoundExchange itself, no further investigation was necessary.

b. SoundExchange claims Dr. Brynjolfsson "concurred that in this market there is competition between the sellers." SX PFF ¶ 192 (citing Dr. Brynjolfsson Reb. Tr. 25). But Dr. Brynjolfsson nowhere in his testimony discusses the market for interactive services (his testimony addresses only the noninteractive webcasting market). *See* 11/21/06 Tr. 25:10-17 (Brynjolfsson) (question referring to a hypothetical market where the existing record companies are selling to the existing webcasters). Indeed, Dr. Brynjolfsson conceded that he "didn't analyze in detail that industry,"

referring to "companies that engage in on demand streaming and conditional download services." 5/8/06 Tr. 289:11-19 (Brynjolfsson).

i. SoundExchange's citation to Dr. Brynjolfsson's rebuttal testimony demonstrates the straws at which SoundExchange is grasping to find competition in the market. Dr. Brynjolfsson refers to his alleged, "quantitative estimate," 11/21/06 Tr. 27:16 (Brynjolfsson), that the record companies would garner a 75% of the surplus in the noninteractive webcasting market (instead of 100%). 11/21/06 Tr. 27:16 (Brynjolfsson), 11/21/06 Tr. 27:18-28:5 (Brynjolfsson); *see* 11/21/06 Tr. 30:4-10 (Brynjolfsson) (monopolist close to 100%).

ii. Dr. Brynolfsson concedes it "would be very advantageous for them to get blanket licenses to all four major companies . . . these blanket licenses would be required valuable." 11/21/06 Tr. 28:11-18 (Brynjolfsson). However he speculates that there will be "a great deal of competition for market share." 11/21/06 Tr. 29:8-9 (Brynjolfsson).

iii. On cross examination, Dr. Brynjolfsson admitted that the extent of his discussion of his "quantitative estimate" of competition in his rebuttal testimony appeared where he asserts, with no citation or support other than his direct testimony, that "I, in turn, have argued in my direct testimony that the 'willing sellers' in this industry would have more bargaining power than the 'willing buyers,'

proposing a 75% / at 25% division of the resulting economic surplus." Brynjolfsson WRT 39; 11/21/06 Tr. 201:19-203:1 (Brynjolfsson) ("a smidgen of it in here").

iv. Dr. Brynjolfsson's statement provides an insight to what he views as a "quantitative estimate." In his direct testimony, Dr. Brynjolfsson devoted a scant three paragraphs to his selection of the 75% / 25% ratio, none of which discuss competition in the market, and none of which discuss or cite to any analysis, other than Dr. Brynjolfsson's understanding of the surplus from iTunes downloads. The paragraphs consist primarily of saying he believed the record companies would have more than equal bargaining power. Brynjolfsson WDT at 8.

v. On cross-examination, Dr. Brynjolfsson said, "There's no way to be exactly precise about how much, what that share will be. It's probably less than 100 percent. It's clearly more than 50 percent given that they have more than half of the bargaining power. I chose 75 percent as a reasonable but conservative estimate of how much of the share they would get reflecting their greater bargaining power." 5/8/06 Tr. 114:15-115:1 (Brynjolfsson).

vi. In fact, in response to a question from Judge Wisniewski, Dr. Brynjolfsson expressed his view that "if it's 99 percent. . . we have a willing buyer and a willing seller market." 5/18/06 Tr. 121:2-5

(Brynjolfsson). Contrast that with Dr. Brynjolfsson's new-found belief on rebuttal (after he learned that competition was a major issue) that "the statute as [he] understand[s] it does not contemplate the result of monopolistic pricing." 11/21/06 Tr. 196:17-197:14 (Brynjolfsson).

vii. It is clear from the foregoing that Dr. Brynjolfsson conducted no "analysis" of competition. He said he was picking a number between 50% and 100% and conveniently settled on 75%. When it suited his purpose, he called that estimate "conservative," suggesting he believed that the true bargaining power/market power was greater.

c. SoundExchange also stretches for the concept of competition for market share, which was nowhere mentioned by Dr. Pelcovits either in his direct testimony or in SoundExchange's Interrogatory response asking the basis for Dr. Pelcovits' conclusion that his market was competitive. *Compare* SX PFF ¶ 306, *with* Joint D-RB PFF ¶ 114 (discussing and citing basis of Dr. Pelcovits' belief that his benchmark market was competitive).

i. The record is devoid, however, of any evidence of the extent to which such competition for market share among the record companies occurs, if it takes the form of price competition, or even if it occurs at all.

ii. SoundExchange alleges (SX PFF ¶ 306) that Dr. Jaffe "concedes" that such competition "may take place" (in the sense of 'it's possible,' which is not evidence). SoundExchange takes Dr. Jaffe's comments out of context. What Dr. Jaffe next said was, "I think it would be exceedingly unlikely that that aspect of competition would have a material impact on the – or would result in rates that come anywhere near a competitive market benchmark because, first of all it's a concentrated industry so they have that to begin with, and they know that overall they are needed by the licensee, and the discussion about the individual rates in the individual contracts is against that background." 11/8/06 Tr. 117:10-20 (Jaffe).

iii. Given the tightly grouped fee structures and fees charged to the interactive services, there is no reason to believe that price competition for "market share" occurs. *See, e.g.,* Joint D-RB PFF ¶¶ 96 (Dr. Pelcovits admitting that record labels do not compete significantly on the basis of price); 125 (discussing similarity of prices in Dr. Pelcovits' 17 benchmark agreements).

iv. The most that even SoundExchange is willing to do is to speculate that "competition to be the beneficiary of that influence may take place among record companies." SX PFF ¶ 310 (emphasis added).

d. SoundExchange also grabs for the idea that the market power of the record companies would be offset by the alleged monopsony power of the services. *See,* e.g., SX PFF ¶¶ 196-199, 303. Again, this is raw speculation that is devoid of support in the record.

   i. SoundExchange claims the evidence suggests that large buyers have monopsony power. SX PFF ¶ 198 (citing Brynjolfsson WRT at 29-30). There is no such statement on those pages, or for that matter, on any other page of Dr. Brynjolfsson's written rebuttal testimony. Presumably, SoundExchange meant to cite pages 38-40, which contains Dr. Brynjolfsson's discussion of the willing buyer/willing seller standard. *See* Dr. Brynjolfsson WRT at 38-40. However, these pages are similarly devoid of any discussion of monopsony power, let alone any discussion of evidence that large buyers have it.

   ii. Indeed, Dr. Brynjolfsson made very clear, in his written direct testimony, that he did not believe buyers could possess such power, at least in the noninteractive webcasting market. "Record companies, on the other hand, do not have the same need to sell to all, or even any, webcasters in order to be successful." Dr. Brynjolfsson WDT at 6. SoundExchange is attempting to have it both ways.

iii. While SoundExchange posits that Yahoo! has such power, SX PFF ¶¶ 198-199, there is again no analysis or evidence of how such power, if it indeed exists, might affect a negotiation for licenses for an interactive service against the major record companies, and certainly no reason to believe that such a negotiation would approximate a competitive market outcome. *See, e.g.,* 11/8/06 Tr. 122:3-18 (Jaffe) (while it "could" – in the sense of "possibly" – be the result, Dr. Jaffe testified it was not the result he would expect).

iv. In any event, Dr. Pelcovits analyzed 17 specific agreements and nowhere did he suggest that any of the buyers in those transactions had monopsony power.

7. Incredibly, SoundExchange asserts that Dr. Jaffe said that the words of the DMCA willing buyer/willing seller standard do not "require or even imply a competitive market standard." SX PFF ¶ 182 (citing 11/8/06 Tr. 101-03 (Jaffe)) (emphasis added). In fact, what Dr. Jaffe said in this very exchange was, "I would say to an economist they imply it," where "it" meant "competitive," as Dr. Jaffe posited. 11/8/06 Tr. 102:20-103:4 (Jaffe) (emphasis added).

## II. SOUNDEXCHANGE'S ENTIRE CASE WITH RESPECT TO AM/FM STREAMING IS THAT IT SHOULD PAY THE SAME FEE RATES UNDER THE SAME FEE STRUCTURE AS INTERNET-ONLY WEBCASTING, DESPITE UNDISPUTED DIFFERENCES THAT DESTROY THAT THEORY.

8. "SoundExchange has proposed that all webcasters – Internet-only and simulcasters; large and small; commercial and noncommercial – should pay the same

royalties." SX PFF ¶ 1086. This single sentence from SoundExchange's Proposed Findings sums up SoundExchange's entire case against Radio Broadcasters. Indeed, SoundExchange's filing confirms that SoundExchange has utterly failed to present a case with respect to AM/FM Streaming by Radio Broadcasters. What little mention there is of Radio Broadcasters in SoundExchange's Proposed Findings amounts to little more than a "them-too" tacked onto the principal case against Internet-only webcasters.

9. SoundExchange cannot prevail on its proposal that the same fee should be applied to both Internet-only webcasting and AM/FM Streaming; there are significant and undisputed differences between the two types of services that, under the applicable law, merit separate rates for AM/FM Streaming and Internet-only webcasters. SoundExchange's Proposed Findings of Fact either do not address these differences, or explicitly confirm them. For example, SoundExchange does not even address, and certainly does not dispute, the following differences between AM/FM Streaming and Internet-only webcasting:

- Radio Broadcasters, unlike Internet-only webcasters, can reach the same listeners over the air without the payment of a sound recording royalty, RB PFF ¶ 146;
- AM/FM Streaming, unlike the subscription services that were integral to Dr. Pelcovits' model and formed part of the basis for Dr. Brynjnolfsson's analysis, is always free to the listener, RB PFF ¶ 146;
- Fewer songs per hour on average are transmitted via AM/FM Streaming than via Internet-only webcasting, RB PFF ¶ 146;

- The relative value of music versus other programming elements is comparatively less on AM/FM Streaming than on Internet-only webcasting due to the significant original content, including the contribution of on-air talent, news, traffic, and weather reports, listener call-in contests, etc., not typically found on Internet-only webcasting services, RB PFF ¶ 146;

- The terms of the musical works royalty agreements that have been entered into by Radio Broadcasters for AM/FM Streaming and by Internet-only webcasters are very different, RB PFF ¶ 147;

- The programming on AM/FM Streaming, unlike Internet-only webcasting, is local in nature and design, and the audiences are overwhelmingly local, RB PFF ¶ 150, 152;

- Many radio stations, unlike most Internet-only webcasters, make very little use of music at all, RB PFF ¶¶ 188-189; and

- Internet-only webcasters are not subject to FCC restrictions on their programming, as Radio Broadcasters are, RB PFF ¶ 193.

10. Moreover, SoundExchange's Proposed Findings confirm the significant differences between AM/FM Steaming and Internet-only webcasting with respect to their relative promotional or substitutional value and the appropriateness of SoundExchange's fee proposal. As demonstrated in Broadcasters' Findings and Conclusions, Parts VI and VII, and below, the Judges should set separate, lower rates for Radio Broadcasters.

## A. SECTION 114 REQUIRES THE JUDGES TO SET SEPARATE RATES FOR DIFFERENT TYPES OF SERVICES.

### 1. The Statute Mandates the Setting of Different Rates for Different Types of Services.

11. SoundExchange opens its bootstrap argument with a misreading of the law: "Nothing in the DMCA requires the Judges to set a separate rate for simulcasters or noncommercial webcasters." SX PFF ¶ 1091. Contrary to what SoundExchange's position, the governing statute states that the Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, according to the statute, there are. The Judges therefore must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type.

12. The argument that Congress could have created separate Section 114 statutory licenses for each type of service, as it did for the Section 118 statutory license, is a red herring. *See* SX PFF ¶ 1092. Section 114 makes clear the obligation to differentiate among different types of services. There is no need for a separate statutory license. In any event, it would have been impractical for Congress to have attempted to foresee all of the different types of services that might arise in the future.

### 2. The Librarian's Decision in the 2001 CARP to Equalize Rates was Fact-Specific and Is Inapplicable Here.

13. The decision of the Librarian of Congress in the 2001 CARP proceeding to equalize the rates paid by broadcasters and Internet-only webcasters cannot be construed to mean that the Judges are precluded from setting separate rates here. *See* SX PFF ¶ 1094. Rather, that decision was a fact-specific decision based on the record of that proceeding.

14. The CARP's recommended rate was based on a single deal between the RIAA and Yahoo! which provided a separate rate for Internet-only and radio simulcast streaming. There was evidence in that proceeding that what Yahoo! was really interested in was the overall rate, not the breakdown between the two rates. Thus, because Yahoo!'s simulcast business was nearly identical to broadcasters' simulcast businesses, the Librarian determined that there should only be one rate. He did not make a determination that the two rates should be the same as a matter of law. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45, 251, 45255 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261).

15. Those circumstances are not present here; in fact, the opposite is true. The record is rife with evidence that AM/FM Streaming is very different from Internet-only webcasting. Thus, a different rate should be set.

## B. CONTRARY TO SOUNDEXCHANGE'S ASSERTIONS, THE RECORD CLEARLY DEMONSTRATES THAT AM/FM STREAMING CREATES SIGNIFICANTLY MORE PROMOTIONAL VALUE THAN INTERNET-ONLY WEBCASTING.

16. The promotional value of AM/FM Streaming is beyond dispute on this record. Indeed, in its zeal to argue that Internet-only webcasting is not promotional, SoundExchange concedes that promotion requires all of the elements present in AM/FM Streaming. By SoundExchange's own arguments, to which they are bound, the Judges must conclude on this record that AM/FM Streaming is substantially more promotional than Internet-only webcasting.

### 1. SoundExchange's Claim That "The Promotional Effect of Webcasting Is Minimal" Is Clearly Inapplicable To Radio Broadcasters.

17. SoundExchange simply ignores the mountains of evidence, including statements of its own witnesses, demonstrating the enormous promotional value of terrestrial radio, and, by virtue of the fact that a simulcast stream is the same product as terrestrial radio, AM/FM Streaming. SoundExchange baldly asserts that "any claimed promotional effect of webcasting is minimal." SX PFF ¶ 940. As discussed at length in Broadcasters' Opening Findings and Conclusions, the record is replete with evidence demonstrating that AM/FM Streaming has significant promotional value. *See* RB PFF Part IV.

18. First, as SoundExchange's own witness testified, "radio is crucial" to the success of the best-selling genres of music sold by the recording industry, 6/12/06 Tr. 30:5-7 (Kushner) (emphasis added), and "remains the best predictor of success for any given artist." Kushner WDT at 10. Other SoundExchange witnesses also attested to the

significance of terrestrial radio to the success of artists and sound recordings. *See* RB PFF ¶ 45. In addition, the conduct and expenditures of the record industry clearly demonstrate the extreme importance the record companies place on radio air play. *See* RB PFF ¶¶ 51-65 (discussing the roles of Radio Promotion Departments and the massive expenditures record companies make to promote sound recordings).

19. Second, the record demonstrates that the promotional value of AM/FM Streaming is at least as great, if not greater, than the promotional value of terrestrial radio. *See* RB PFF ¶¶ 69-77. AM/FM Streaming provides the exact same benefits of over-the-air play because identical programming is transmitted over the stream as is broadcast over-the-air. *See, e.g.*, RB PFF ¶ 69. Further, AM/FM Streaming provides additional promotional features not present on terrestrial radio, such as artist and song title identification, in-depth biographical and discography information, and the opportunity to act instantly on a desire to buy, either through established links or by visiting a retail website. *See* RB PFF ¶¶ 72-77.

20. SoundExchange asserts that the evidence related to "buy buttons" "demonstrates that [sic] webcasting has virtually no promotional effect and provides no basis on which to adjust the statutory license rate." SX PFF ¶ 942. However, SoundExchange, while "buy buttons" offer a convenience to streaming listeners, they are not the only avenue for purchasing music listeners hear over a stream. Evidence of sales achieved through "buy buttons" do not account for purchases influenced by a simulcast stream, yet made through other on-line retail outlets or in record stores. RB PFF ¶ 76.

21. Moreover, Dr. Pelcovits' assessment of buy buttons on two Bonneville station websites for one month, SX PFF ¶¶ 950-51, failed to consider the fact that the "buy buttons" were a very new service at that time. *Compare* 11/27/06 Tr. 217:7-218:4 (Pelcovits); with 7/27/06 Tr. 75:15-16 (Coryell). Further, the services offered by the Bonneville stations did not include the ability to purchase CDs, only single tracks. 11/27/06 Tr. 216:20-217:6 (Pelcovits). SoundExchange's citation of Clear Channel click-through sales, SX PFF ¶ 945, is wholly out of context, as the record does not reflect whether and on what basis Clear Channel was compensated or how many Clear Channel stations provided this facility in 205.

22. SoundExchange argues that promotional value has not been quantified. *see* SX PFF ¶ 940. That is not correct. Radio Broadcasters have, in fact, quantified the extraordinary promotional value of AM/FM Streaming. *See* RB PFF Part IV.A.3. The record evidence, based on a representative label put forth by SoundExchange, undeniably demonstrates the incredible sums the record industry spends on promotion. *Id.* As SoundExchange's economist recognized, the record companies would not spend this money if it didn't pay to do so. RB PFF ¶ 64.

23. In any event, it is not Radio Broadcasters who are arguing that AM/FM Streaming and Internet-only webcasting should pay the same rate. The burden should not be on Radio Broadcasters to precisely quantify the promotional value of AM/FM Streaming. The record evidence is overwhelming that there are substantial differences in promotional value between AM/FM Streaming and Dr. Pelcovits' benchmark interactive service market and between AM/FM Streaming and Internet-only webcasting (by SoundExchange's own theories and witnesses). That is sufficient to establish that the

fees for AM/FM Streaming and Internet-only webcasting cannot be the same and SoundExchange's fee proposal must be rejected for AM/FM Streaming.

24. SoundExchange's arguments that webcasting is not promotional further confirm Radio Broadcasters' position that AM/FM Streaming and Internet-only webcasting should be treated differently. SoundExchange admits that terrestrial radio is important and should be part of a promotional campaign, SX PFF ¶ 959, but that obtaining spins on Internet radio has "little or no promotional effect." SX PFF ¶ 961. AM/FM Streaming contains the same programming as terrestrial radio and is streamed to essentially the same audience at the same time. *See, e.g.*, RB PFF ¶¶ 69-70. Since SoundExchange concedes that terrestrial radio is promotional – and AM/FM Streaming is the same as terrestrial radio – and asserts that Internet-only webcasting is not promotional, it follows that the two services are different.

### 2. SoundExchange's Claim That Promotion To Terrestrial Radio Is Unimportant Is Astounding and Completely Unsupported By The Record.

25. SoundExchange asserts that "the promotional importance of terrestrial radio ... is on the decline," and there are "many other critically important parts of a comprehensive marketing plan that have nothing to do with playing sound recordings on terrestrial radio." SX PFF ¶ 964. As examples of "other critically important parts of a comprehensive marketing plan," SoundExchange cites Internet blogs, MySpace, social networking, and specialized music-genre websites. *Id.* These claims directly contradict the voluminous record evidence describing the tremendous efforts the record companies engage in to promote their sound recordings to terrestrial radio, not to mention the hundred of millions of dollars spent on promotion. *See* RB PFF Part IV. There is little

dispute that promotion to terrestrial radio, and consequently to AM/FM Streaming, is critical to the success of an artist or record company, and SoundExchange's attempt to downplay the importance of terrestrial radio is fanciful.

### 3. SoundExchange's Assertion that Record Companies Do Not Take Promotion into Account in Licensing Is Belied by the Record and Common Sense.

26. SoundExchange asserts that "record companies would not consider claims of promotion in the context of licensing a broad catalog of their sound recordings for a music service." SX PFF ¶ 979. However, the record evidence shows that promotion is indeed a factor record companies consider when licensing catalogs. For example, a Sony-BMG memo entitled [[

]] states that [[

]] Servs. Ex. 41 at 1.

27. SoundExchange concedes that record companies take promotional value into consideration when licensing master use and synch rights. SX PFF ¶ 518 (noting that "there is likely to be a promotional effect on the sales of CDs but little or no substitutional effect.").

28. Further, the record company lawyers who testified argued strongly that substitution, the flip side of promotion, is a relevant factor in licensing decisions. *See, e.g.,* Eisenberg WDT at 7; 6/7/06 Tr. 83:21-84:4 (Kenswil). The distinction that these

witnesses are trying to sell to the Court – between the half-full glass and the half-empty glass – defy common sense.

29. SoundExchange tries to justify the distinction between promotion and substitution by arguing that "the bulk of what is licensed in a catalog license for digital distribution are old tracks that are not being promoted." SX PFF ¶ 417. That statement, of course, further confirms the inapplicability of SoundExchange's theories to AM/FM Streaming, which is decidedly different, and contains all of the same tracks that are actively being promoted on broadcast radio.

#### 4. The Statutory Mandate To Consider Promotional Value In Setting Reasonable Rates Is Not A Comparative Analysis.

30. SoundExchange asserts that "promotion is a 'two-way street,'" SX PFF ¶ 965, and criticizes the services for not providing "evidence to quantify the promotional benefit they claim record companies receive from webcasters and compare it to the benefits webcasters receive from record companies." SX PFF ¶ 936. SoundExchange's suggestion that the relative benefits to the record companies and radio broadcasters should be weighed is plainly wrong and contrary to the statute and legislative history. *See* 17 U.S.C. § 114(f)(2)(B). The statute directs the Judges to consider "whether use of the service may substitute for or may promote the sales of phonorecords." 17 U.S.C. § 114(f)(2)(B)(j). As discussed in the Joint D-RB Findings and Conclusions, this factor entails consideration of the promotional or substitutional impact of a service to the record companies in the absolute sense, not a comparative sense. The statute does not direct the Judges to compare the promotional impact against any value received by the services due to the labels' extensive promotional efforts. *See* Joint D-RB PCL ¶¶ 58-61.

31. In any event, as discussed in Radio Broadcasters' Findings and Conclusions, record companies benefit far more from radio promotion (as reflected by their expenditures) than broadcasters. *See* RB PFF, Part IV.A.3.

### C. SOUNDEXCHANGE'S ENTIRE THEORY OF SUBSTITUTION IS BASED ON CHARACTERISTICS OF INTERNET-ONLY WEBCASTING THAT ARE CLEARLY INAPPLICABLE TO AM/FM STREAMING.

32. Each of the reasons SoundExchange proffers to argue that webcasting is substitutional is directed squarely at Internet-only webcasting and has nothing to do with AM/FM Streaming, further confirming that the differences between Internet-only webcasting and AM/FM Streaming justify different rates for these services.

33. SoundExchange asserts that webcasting is substitutional because of the sheer number of Internet-only webcasting stations that offer narrow niches of programming. SX PFF ¶¶ 992-1000. SoundExchange takes great pains to emphasize the "tens of thousands of webcasting channels" that are "narrowly targeted to specific genres." SX PFF ¶ 996. These assertions are clearly directed to Internet-only webcasters and are completely inapplicable to AM/FM Streaming. AM/FM Streaming services offer mainstream, focused playlists that are design to appeal to a mainstream audience. *See* RB PFF ¶161. Even SoundExchange's expert witness James Griffin agreed that AM/FM Streaming was not narrowcasting: "Radio simulcasts are far less narrowcasts than multi-channel, multi-genre, Internet-only webcasters." 11/22/06 Tr. 229:4-13 (Griffin).

34. SoundExchange further contends that webcasting services have search capabilities that allow users to search for specific music. SX PFF ¶¶ 1008-1011. Again,

SoundExchange's arguments are directed solely at Internet-only webcasting and are totally unrelated to AM/FM Streaming.

35. In addition, SoundExchange argues that webcasting services offer CD-quality streams, yet SoundExchange cites no evidence that AM/FM Streaming is available at bit rates approaching CD-quality. In fact, the record demonstrates that most radio simulcasts are streamed at bitrates much lower than CD quality. Mr. Griffin testified that CD quality is approximately 128-320k, yet he agreed "that most radio simulcaster[s] stream at about 32k." 5/3/06 Tr. 141:4-12, 279:7-9, 280:7-13 (Griffin); *see also* RB PFF ¶¶ 89-90, 178-181.

36. As discussed in Broadcasters' Findings and Conclusions, SoundExchange presents nothing more than anecdotal evidence that AM/FM Streaming under the statutory license may cause displacement. *See* RB PFF Part IV.E. SoundExchange contends that stream-ripping software is prevalent, but presented no evidence that it is commonly used to download AM/FM streams and no quantitative evidence about such use. *See* RB PFF ¶ 93.

37. SoundExchange broadly argues that "any music service that takes up a user's time listening to music is potentially substitutional for other music products and services." SX PFF ¶ 989. If this were the case, terrestrial radio would be considered substitutional – but that is clearly not the view of the record companies, given the huge sums they expend and enormous efforts they make to obtain radio airplay.

38. Overall, SoundExchange presents no evidence that AM/FM Streaming is substitutional of permanent sales. Their arguments are directed to Internet-only

webcasting, not AM/FM Streaming, and confirm Radio Broadcasters' position that AM/FM Streaming is different from Internet-only webcasting and should be subject to lower rates.

### D. THE EVIDENCE DOES NOT SUPPORT SOUNDEXCHANGE'S CLAIMS ABOUT COMPETITION OR CANNIBALIZATION AMONG LICENSEES.

39. In support of its theory that one royalty rate fits all, SoundExchange offers only two interrelated arguments: it claims that the services all compete with each other, and it claims that cannibalization of the market might occur if different prices are set.[4] *See* SX PFF ¶ 1095-1114.

40. SoundExchange, however, has failed to quantify the nature or extent of either the alleged competition or cannibalization. Nor has it shown how either would be relevant in setting the price that would be paid by willing buyers that have the different characteristics identified by Radio Broadcasters.

41. Moreover, it is instructive that SoundExchange does not attempt to show that Internet-only webcasters and Radio Broadcasters are similar in terms of their business model, their promotional or substitutional value, their programming content, their amount and kind of music use, or the other factors identified by Radio Broadcasters. Indeed, it cannot do so, in the face of the record evidence.

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[4] Curiously, SoundExchange suggests that it is significant that Dr. Jaffe did not propose different rates for simulcasters and webcasters. SX PFF ¶ 1102. Dr. Jaffe did not analyze simulcasters or consider them in his fee model or fee proposal, prepared on behalf of DiMA in the direct phase of the case. 11/8/06 Tr. 223:4-224:14 (Jaffe). Contrary to SoundExchange's proposed finding, Dr. Jaffe testified that there were numerous factors that would suggest a different rate. Id. 223:19-225:13.

**1. Competition.**

42. SoundExchange's evidence that Radio Broadcasters compete with Internet-only webcasters for either audience or advertising dollars limited to qualitative, broad statements that provide no evidence of the nature or extent of the alleged competition. Simply asserting that services "compete" says nothing about the price that they would pay for an input in the marketplace.

43. SoundExchange's Proposed Findings make no attempt to quantify the nature or extent of the alleged competition between any two groups of webcasters. Dr. Brynjolfsson admitted he had not done any quantitative analysis of the level of competition among webcasters for the sale of advertising. 11/21/06 Tr. 229:3-230:11 (Brynjolfsson). Without any evidence of the actual extent to which competition exists among different kinds of licensees, there is no means to assess SoundExchange's effort to equate any two types of services.

44. Indeed, the notion that whether services compete should affect what they pay for an input is inconsistent with SoundExchange's own case in several respects.

a. First, if one is to accept SoundExchange's view of the world, the assertion proves too much. According to SoundExchange, everything competes with everything. *See* 6/7/06 Tr. 18:12-16, 87:1-7 (Kenswil) (positing substitution because there are only so many hours in the day); 5/11/06 Tr. 181:4-10 (Eisenberg) (same); Pelcovits WRT at 17, 21; 11/27/06 Tr. 213:10-214:1 (Pelcovits) (relying on Kenswil and Eisenberg statements).

b. Second, consideration of the existence or non-existence of competition between two types of services is fundamentally inconsistent with Dr. Brynjolfsson's method of analysis. Dr. Brynjolfsson models license fees based on a presumed negotiation over surplus. *See generally* Brynjolfsson WDT. Nothing in the record suggests that the surplus of one type of competitor is in any way related to the surplus of another type of competitor. Again, Dr. Brynjolfsson, and SoundExchange, are cherry picking methods of analysis when it suits their ends.

45. In any event, the evidence points in the other direction: AM/FM Streaming and Internet-only webcasting target different audiences and advertisers and are sold in different ways.

46. The case for significant competition between AM/FM Streaming and Internet-only webcasting for audience or advertisers is slim. While Internet-only webcasters cater to a national audience, AM/FM Streaming, just like terrestrial radio, is an overwhelmingly local business. Indeed, Mr. Coryell has been able to determine that approximately 85% of his online listenership comes from the local area. Coryell WDT ¶ 12. And contrary to what SoundExchange implies in its Proposed Findings, ¶ 1105, Mr. Parsons testified that Clear Channel actually blocks global access to its streams. 7/31/06 Tr. 222:22-223:6 (Parsons). Thus, a San Franciso radio station is not competing with AOL or LIVE365 for listeners in Salt Lake City, Philadelphia, or Dubai.

47. The evidence shows that Radio Broadcasters actually have a disincentive to build their audience beyond their local area. Mr. Halyburton said, "You know, . . . any listenership that happens outside of let's say Dallas-Fort Worth as an example, . . . is

really of no value to us because there's no way for us to get ratings for that, there's no way we can get credit for that, there's no way to make money for it." 7/26/06 Tr. 34:13-19 (Halyburton). Mr. Coryell explained, "We obviously do not promote online streaming to out-of-market audiences. We wish they wouldn't listen at all. Under the current rate structure, it's bad enough paying for the listeners our few advertisers want to reach. We cannot afford superfluous listeners." Coryell WDT ¶ 16. In fact, he said that blocking access to everyone except those who entered a local zip code "is not a bad idea." 7/27/06 Tr. 25:13 (Coryell). AM/FM Streaming simply does not target the same audience as Internet-only webcasting.

48. Because their audiences are different, their advertisers are different too. Mr. Halyburton, for example, testified that "local and regional advertising generally accounts for . . . close to 100% of our online advertising." Halyburton WDT ¶ 10. At Bonneville, too, "[t]he great majority of our advertising is local." Coryell WDT ¶ 15. "We do not sell at Bonneville, San Francisco, we do not make any effort to sell to anyone who does not want to reach specifically the San Francisco Bay Area." 7/27/06 Tr. 37:20-38:1 (Coryell). In fact, Mr. Coryell stated that his advertisers have "reservations about having to pay for people outside the market to which they are targeting their advertising." 7/27/06 Tr. 88:8-10 (Coryell). To say that a licensee with 85% of its audience in one city is in competition with a licensee that draws an audience worldwide for advertising is beyond reasonable. In the case of Internet-only webcasting, of course, there is no "local."

49. Nor does the fact that some Radio Broadcasters are trying to sell AM/FM Streaming nationally say anything about the significance of this activity or the extent to which AM/FM Streaming actually competes with Internet-only webcasting. First, the

evidence shows that national sales of AM/FM Streaming have been disappointing. *See* 7/27/06 Tr. 39:2 (Coryell) (testifying that Bonneville's three San Francisco stations made $600 in national advertising from fall 2005 through July 2006); 7/31/06 Tr. 217:2-16 (Parsons) (stating that Clear Channel made [[ ]] across hundreds and hundreds of streaming stations from its relationship with Ronning Lipset Radio in the first six months of 2006); 7/26/06 Tr. 43:9-14 (Halyburton) (stating about Net Radio Sales, "there's very, very little of that business that we've seen."). Second, as Mr. Parsons testified, even when AM/FM Streaming is sold nationally, it is sold on a different basis than Internet-only webcasting. 7/31/06 Tr. 242:6-243:16 (Parsons) (AM/FM Streaming sold on spot basis, Internet-only services sold on CPM basis).

50. SoundExchange's reliance on Clear Channel's proposed Z100 offering lacks any credibility. Mr. Griffin testified that he had never tried the service, had no opinion on the quality of the user experience, and never discussed the service with anyone at Clear Channel or the radio station or the wireless company. 11/22/06 Tr. 198:22-200:8 (Griffin). Indeed, when asked if he knew that the streaming part of the service had been terminated, he admitted "I didn't know that, no, certainly when I put this in, no" and that he had not been to the Z100 website lately. *Id.* 202:5-12.

51. SoundExchange is quick to point to Clear Channel for evidence that simulcasters view themselves as in competition with Internet-only webcasters. *See, e.g.,* SX PFF ¶¶ 1109. Even there, SoundExchange offers no evidence of the extent or success of any such competition. And, apart from comments about Net Radio Sales, discussed above, SoundExchange does not even try to offer evidence that other simulcasters are competing with Internet-only webcasters.

### 2. Cannibalization

52. SoundExchange raises the specter of cannibalization if different rates are set for different types of services, SX PFF ¶¶ 42, 1095-1103, but in the end, it all turns out to be conjecture. There is no evidence that cannibalization will actually occur. Dr. Brynjolfsson always carefully characterized it as a "risk," not a fact. *See, e.g.*, 11/21/06 Tr. 106:16 (Brynjolfsson). Further, Dr. Brynjolfsson once again did not do any quantitative study of his cannibalization theory. 11/21/06 Tr. 257:5-14 (Brynjolfsson). Contrary to the expressed fears, the evidence points to the conclusion that the magnitude of any risk is small.

53. First, the 2001 CARP set separate, lower, rates for noncommercial licensees, and the Small Webcasters Settlement Act of 2002 allowed the payment of even lower rates. This means that webcasters have been paying under three different rate structures for four years. If cannibalization were a meaningful threat, there would be evidence of it occurring and SoundExchange would have been able to present concrete evidence instead of conjecture. But SoundExchange has not even attempted to offer any such evidence. Thus, even with a real-world situation of the type SoundExchange says is the most risky, there is no basis to credit SoundExchange's theory.

54. Second, Dr. Brynjolfsson's cannibalization theory depends on a premise that is not supported by the evidence. SoundExchange stated in its Proposed Findings that "webcasters [meaning both Radio Broadcasters and Internet-only webcasters] are seeking the same goods – a blanket license in sound recordings – to offer to the same consumers." SX PFF ¶ 1098. It is true that both Radio Broadcasters and Internet-only webcasters are seeking a blanket license to perform sound recordings over the Internet,

but that is not the product they are offering to their consumers. As described above, Internet-only webcasters offer "thousands of niche stations" featuring specialized music programming, SX PFF ¶ 418, whereas Radio Broadcasters offer highly localized, mass-appeal entertainment featuring disc jockeys, morning shows, news, contests, and other features in addition to music. *See, e.g.*, RB PFF, Parts VI.C & D; 7/27/06 Tr. 29:16-17 (Coryell) (stating, "We create an entertainment product using a palette of different ingredients."). Dr. Brynjolfsson asserts that "the risk of cannibalization is very real and it's enormous" when "you're offering the identical product." 11/21/06 Tr. 106:13-17 (Brynjolfsson). But Radio Broadcasters and Internet-only webcasters are not offering an identical product.

55. Third, the services' listeners are not the same. If someone wants to hear a traffic report, he does not turn on Yahoo!'s Launchcast. If someone wants to hear klezmer music, she does not turn on her car radio. Moreover, Internet-only webcasters have a national presence, but AM/FM Streaming is overwhelmingly a local activity. RB PFF ¶ 18; Halyburton WDT ¶ 10; Coryell WDT ¶¶ 13, 16; Parsons WDT ¶ 13; 5/2/06 Tr. 56:9-22 (Griffin); 7/27/06 Tr. 27:18-29:6; 267:9-268:1 (Coryell). Thus, the audiences are different as well.

## E. THE DIFFERENCES BETWEEN AM/FM STREAMING DEMONSTRATED BY RADIO BROADCASTERS ESTABLISH THE ABSURDITY OF APPLYING THE SAME PERCENTAGE OF REVENUE TO AM/FM STREAMING AS TO INTERNET-ONLY WEBCASTING.

### 1. Any Percentage of Revenue Fee Is Totally Inappropriate for AM/FM Streaming.

56. Broadcasters' Proposed Findings and Conclusions demonstrated why any percentage of revenue fee would be wholly inappropriate for AM/FM Streaming. RB PFF, ¶¶ 226-260. Radio Broadcasters will not repeat that material here.

### 2. In No Event Should the Same Percentage of Revenue Fee Be Applied to AM/FM Streaming and Internet-only Webcasting

57. Even if the Court were to deem a percentage of revenue based fee to be appropriate, the evidence makes clear that application of the same percentage of revenue as is applied to Internet-only webcasters would be arbitrary and could not be supported.

58. The undisputed evidence on the record demonstrates that sound recordings play a different role in AM/FM Streaming and Internet-only webcasting and that simulcasters and Internet-only webcasters make different contributions to their programming. *See* RB PFF, ¶¶ 187-201D. SoundExchange's Proposed Findings and Conclusions do nothing to dispute those facts.

59. When an input plays a lesser role in the provision of a product or service, it is fundamental that it receives a smaller percentage of the revenue generated by that product or service. After all, revenue must cover all inputs and contributions to a product or service.

60. Even starting from the premise that different services would wind up paying the same for an input in willing buyer/willing seller negotiation, which for the

reasons discussed in Radio Broadcaster Findings of Fact is not a correct outcome, *see* RB PFF, ¶¶ 141-207, does not follow that the same percentage of revenue would apply. As a simple example, even if a Hyundai and a Mercedes used the same Michelin tires, which cost the manufacturer the same price, the percentage of the carmaker's revenue for each car paid to the tire manufacturer would be dramatically different.

### 3. Because SoundExchange Seeks To Apply a Percentage of Revenue Fee to AM/FM Streaming—Indeed the Same Percentage of Revenue it Seeks To Apply to Internet-only Webcasting—Its Fee Proposal Must Be Rejected.

61. In short, the failure of SoundExchange to account for the fundamental differences between AM/FM Streaming and Internet-only webcasting means its proposal to apply the same percentage of revenue to both types of services must be rejected.

## III. SOUNDEXCHANGE'S PROPOSED FINDINGS CONFIRM THE INADEQUACY OF ITS EXPERT'S FEE MODELS.

62. Radio Broadcasters have fully addressed the models of Dr. Brynjolfsson and Dr. Pelcovits in the Joint D-RB Findings and Conclusions. However, a number of points are worth noting or reiterating in light of SoundExchange's filing.

63. Dr. Brynjolfsson's assertion that the data on which he relied are of similar quality to the data relied on in academic studies, SX PFF ¶ 591, should provide little comfort. Even if true, the nature of "academic" studies is that real-world decisions worth millions of dollars do not hinge on them.

64. Dr. Brynjolfsson's assertion that bandwidth costs are continuing to decline, SX PFF, Part VI.C.4, is contradicted by the evidence and by developing trends.

a. Dr. Brynjolfsson's statement was directly contradicted by Brian Parsons, who purchases bandwidth for Clear Channel. Mr. Parsons testified that he had not seen declines "over the last year or two. Bandwidth prices have been fairly consistent." 7/31/06 Tr. 16:12-17 (Parsons).

b. Moreover, Dr. Brynjolfsson testified that at least part of the decline in bandwidth costs he discusses was due to the bursting of the Internet bubble. 5/18/06 Tr. 16:14-21 (Brynjolfsson). Thus, it is inappropriate to base future projections of bandwidth cost declines on the 2000 to 2005 experience.

c. Further, documents relied upon by SoundExchange's experts make clear that demand for bandwidth-intensive activities, including video streaming, growing explosively. See 5/10/06 Tr. 258:3-259:6 (Brynjolfsson) (report relied upon by Dr. Brynjolfsson referring to "explosion in streaming video"); Serv. R. Ex. 17 (article relied on by Mr. Griffin stating that streaming video is the fastest growing segment of Clear Channel's online offerings); 11/22/06 Tr. 213:3-216:16 (Griffin) (discussing Mr. Griffin's mischaracterization of that article in his report). Substantial growth in demand is likely to put significant upward pressure on prices.

65. SoundExchange argues that Dr. Pelcovits was correct in relying on subscription services for his model. SX PFF, 318-331 However, as discussed by Dr. Jaffe, such reliance impermissibly skims the cream of the relatively small number of highest value listeners off of the current market to form the basis of the Pelcovits analysis. Jaffe WRT at 23. Indeed, permitting Dr. Pelcovits to base his analysis on

subscription and captures all of the uncertainty about the future of advertising supported services in favor of SoundExchange.

66. SoundExchange's reliance on Dr. Brynjolfsson's "Fee Model 1," which attempts to adjust for differences since the Web I decision is badly misplaced.

67. First, the model requires the assumption that the fee established in Web I was the correct fee. In light of the disarray in the industry for much of the term of that fee, it cannot reasonably be said that the fee was correct.

68. Moreover, there are independent reasons to believe the decision in Web I overstated the appropriate fee. *See* Joint D-RB PFF ¶ 278 & n. 39.

69. Finally, as was demonstrated on cross examination, Dr. Brynjolfsson's Model 1 resulted in webcaster losses through at least 2006. *See* 5/9/06 Tr. 246:10-21 (Brynjolfsson). To make the model work, Dr. Brynjolfsson claims that the difference is an imputed non-cash benefit that webcasters must have been willing to pay (or else the Web I fees could not have been right). *See, e.g., id.* Tr. 246:17-247:11. This kind of fudge factor deserves no weight.

## IV. IV. SOUNDEXCHANGE'S ATTACKS ON RADIO BROADCASTERS' FEE MODEL ARE BASELESS.

70. Radio Broadcasters' fee proposal is based on the agreements between the Radio Music License Committee ("RMLC") and ASCAP and BMI for AM/FM Streaming performances of musical works. *See* RBX 5; RBX 6. SoundExchange's principal attack on the fee proposal is the fact that it is based on a benchmark of the digital performance of musical works. *See* SX PFF ¶ 1463. That objection is discussed

in at length in the Joint D-RB Findings and Conclusions, Part II D-RB PCL 28-74. The following paragraphs address the specific criticisms SoundExchange has raised concerning Radio Broadcasters' benchmark agreements.

### A. CONTRARY TO SOUNDEXCHANGE'S ASSERTIONS, THE AM/FM STREAMING FEE WAS SPECIFICALLY NEGOTIATED WITH BOTH BMI (THROUGH 2006) AND ASCAP (THROUGH 2009).

71. SoundExchange begins by asserting that "[t]he BMI agreement . . . expires in 2006 and the ASCAP agreement that extends beyond 2006 does not break out separate payments for streaming." SX PFF ¶ 537. Thus, SoundExchange asserts that, thus, "[t]here is no basis . . . to estimate streaming fees for any year after 2006." SX PFF ¶ 1467.

72. This bald statement completely overlooks or consciously ignores the uncontroverted testimony of Keith Meehan, Executive Director of the Radio Music License Committee, who personally participated in the negotiations. Meehan WRT, ¶ 2; Tr. 11/13/06 109:10-17 (Meehan). Mr. Meehan testified from personal knowledge that ASCAP and the RMLC negotiated separate streaming royalties for each year from 2007 to 2009, which were then rolled into the total fee. Specifically, ASCAP and the RMLC negotiated a streaming-only royalty of $675,000 for 2007, $700,000 for 2008, and $725,000 for 2009. Mr. Meehan WRT ¶ 11. SoundExchange's assertion that the ASCAP Agreement provides no basis to estimate fees for 2006 through 2009 is, therefore, demonstrably false.

73. SoundExchange next asserts the simulcast royalties on which Radio Broadcasters' fee proposal is based are unreliable because, it claims, "ASCAP and BMI

likely cared more about the overall payment, than the relatively small amounts attributed to streaming." SX PFF ¶ 1465. For this assertion, SoundExchange relies on unfounded speculation by Dr. Brynjolfsson that is directly contradicted by the testimony of Mr. Meehan, who participated in the negotiations.

74. SoundExchange relies entirely on an assertion by Dr. Brynjolfsson concerning ASCAP's and BMI's alleged lack of motivation to negotiate a fair market streaming fee, and an alleged incentive on the part of the RMLC to understate the value of streaming with an eye towards this proceeding. *See* SX PFF ¶ 1465 (citing Brynjolfsson WRT at 12).

75. Dr. Brynjolfsson, however, is not competent to speculate about the intentions of ASCAP, BMI or the RMLC. He admitted on cross examination that did not speak with anyone at ASCAP or BMI or the RMLC or any radio broadcaster – indeed, he did not speak with anyone involved in the negotiation of these agreements at all – before making his assertion. 11/21/06 Tr. 189:12-190:14 (Brynjolfsson). His guess is not evidence.

76. Similarly, although he tried to qualify his answer at trial, Dr. Brynjolfsson admitted, when asked at his deposition, whether the RMLC actually sought to create a low benchmark, "I don't know whether it happened." 11/21/06 Tr. 190:15-192:12 (Brynjolfsson).

77. In stark contrast, Mr. Meehan, as the Executive Director of the RMLC, was personally involved with the negotiations of both of these agreements. He testified that streaming rates were specifically negotiated separately from the terrestrial broadcast

rates, and that these streaming rates were "based on the parties' assessment of the fair market value of Internet simulcasting." Mr. Meehan WRT ¶ 11; 11/13/06 Tr. 115:22-117:12 (Meehan).

78. What is more, he also testified that, contrary to Dr. Brynjolfsson's conjecture, the RMLC did not, in fact, negotiate either deal with the intention of using them as benchmarks in this proceeding. 11/13/06 Tr. 117:13-17 (Meehan). Thus, based on the testimony of someone who was actually there at the time and did not need to guess about what may be "likely," the evidence shows that ASCAP and BMI did in fact care enough about the breakdown to negotiate a separate fair-market-value number. Thus, the streaming fees negotiated by ASCAP and BMI with the RMLC represent an accurate benchmark of the value of a performance license for simulcast streaming.

79. SoundExchange also incorrectly cites an exchange with Mr. Meehan as evidence that the parties did not care about streaming. Mr. Meehan, asked about specific streaming amount for each year negotiated in still ongoing negotiations with BMI for 2007-2009 (on which he did not rely in his testimony), said that although the parties had an agreement in principle (on amount), they had not come to a definitive agreement (on allocating those amounts among the years). *See* 11/13/06 Tr. 138-40 (Meehan).

80. SoundExchange has no reason to complain that the ASCAP and BMI agreements used as benchmarks in Radio Broadcasters' fee proposal were not accompanied by "evidence about the assumptions or other information about streaming or revenues from streaming (i.e., listening hours) that may have underlay the flat fees." SX PFF ¶ 1466. The agreements specifically grant the entire radio industry the right to

perform musical works over the Internet to an unlimited extent in exchange for a flat fee. *See* RBX 5; RBX 6. There is no record evidence to suggest that the parties believed that an assumption about numbers of listening hours or revenues was relevant to the determination of an appropriate rate for the period. *See* Meehan at 121 – revenues influence the station's share of the pie, but no the overall price. Certainly, SoundExchange did not ask about such assumptions on cross examination of a person directly involved in the negotiations. Rather, as should be the case in this proceeding, the deals set a single value for a license to perform musical works, not a value for an individual performance of a musical work. There were no assumptions or information about revenue in the negotiations, because ASCAP and BMI rightly realized that a license to make performances is not what drives revenue in the radio business.[5] *See* Mr. Meehan WRT ¶¶ 6-8; RB PFF 226-260.

81. SoundExchange suggests that the fact that the ASCAP and BMI agreements "were settlements of litigation" settled litigation" for a number of years renders them invalid as benchmarks. SX PFF ¶ 1468. However, unlike the agreements made in settlement of copyright infringement litigation, where the risk of not settling weighed most heavily on the accused services, *see* Joint D-RB PFF ¶¶ 264-66. Rather the only litigation that was settled was fee litigation, where the Rate Court was charged with adjudicating a competitive fair market fee. Joint D-RB PCL 39-46. Mr. Meehan, who participated in the negotiation testified about the parties intent. Mr. Meehan WRT ¶¶ 9-11.

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[5] SoundExchange oddly, pretends that Mr. Meehan did not testify in the case at all. SX PFF ¶¶ 539-40.

82. Moreover, unlike the Yahoo-RIAA deal in 2000, where only one party was able to avoid litigation by making the deal, *see* D-RB PFF ¶ 278 & n. 39, both BMI and the RMLC faced the threat of litigation costs in the Rate Court, so both sides had an incentive to avoid those costs and settle on an agreement. SoundExchange's reference to "assessment of [the parties'] relative legal risk," SX PFF ¶ 1468, refers only to the parties assessment of the likely outcome of a trial seeking to set a competitive fair market fee.

### B. SESAC IS NOT A VALID BENCHMARK.

83. SoundExchange chastises Radio Broadcasters for not including their SESAC streaming agreements in the in the mix. SX PFF ¶ 543. However, the uncontroverted testimony demonstrated that SESAC exercises unconstrained market power in its licensing of radio broadcasters, as a seller with whom all buyers must, as a practical matter, deal. Both fact and expert witnesses testified that radio broadcasters cannot operate without a SESAC license, must buy from SESAC, and, despite its collection of tens of thousands of copyrights and collective pricing activities, is not yet subject to the control of an antitrust order. *See* 11/8/06 Tr. 272:5-273:9, 275:21-281:15 (Jaffe); 7/26/06 Tr. 184:15-185:19 (Halyburton); 7/27/06 Tr. 290:8-292:13 (Hauth); Hauth WDT ¶ 8.

84. Dr. Jaffe testified that he had worked on SESAC issues "quite a bit" and that broadcasters frequently don't know which PRO controls the music they put on the air, so that the broadcaster needs a SESAC license, lest it face potential statutory damages for infringement. 11/8/06 276:8-278:1 (Jaffe). He further testified that SESAC frequently seeks two to three times what ASCAP or BMI are paid for the same works, or up to 10% of total revenues for 3% of the repertory. 11/8/06 Tr. 278:21-279:16 (Jaffe).

Because the actual payment is typically relatively small, they "fly under the radar" and avoid antitrust suit. 11/8/06 Tr. 280:2-281:15 (Jaffe). Mr. Halyburton and Mr. Hauth both confirmed the inability to do business as a broadcaster without a SESAC license. 7/26/06 Tr. 185:9-19 (Halyburton); 7/27/06 Tr. 290:4-292:13 (Hauth). Mr. Hauth testified to SESAC's "take-it-or-leave-it" approach to licensing. 7/26/06 Tr. 290:20-291:8 (Hauth) Mr. Meehan testified that the RMLC had attempted to negotiate with SESAC, but that "nothing ever came of those discussions." 11/3/06 Tr. 110:22-111:13 (Meehan).

### C. THE BENCHMARK FEES USED BY RADIO BROADCASTERS' FEE PROPOSAL ARE THE AM/FM STREAMING FEES TO ASCAP AND BMI REASONABLY ALLOCATED TO THE APPLICABLE YEARS.

85. SoundExchange argues that the "most fatal[]" feature of Radio Broadcasters' fee proposal is that the year-by-year breakdown within the multi-year licenses negotiated with ASCAP and BMI is "arbitrary." *See* SX PFF ¶¶ 1469-1473.

86. First of all, the royalty fees payable to ASCAP for streaming were not arbitrarily negotiated. As described above, and as SoundExchange appears to have forgotten, specific numbers were agreed for each year from 2007 to 2009 during the course of the ASCAP-RMLC negotiations that represent "the parties' assessment of the fair market value of Internet simulcasting." Mr. Meehan WRT ¶ 11. Moreover, while the BMI Agreement recites that the allocation of the total $2,000,000 streaming fee among the years 2003-2006 was "arbitrary," it was not so arbitrary that ASCAP objected to that allocation in deciding the fees it would receive for 2004-2006, which represented

only a part of the period. *See* RBX 6; Mr. Meehan WRT ¶ 10; Halyburton WDT ¶ 49. That ASCAP accepted the allocation provides independent economic validation.

87. Second, to the extent that the year-by-year allocation of the fees payable to BMI for AM/FM Streaming were arbitrary, the total fees for all four years of the license period were certainly not. *See* 11/13/06 Tr. 130:20-21, 131:5-7 (Meehan) (stating that the royalty fee was intended to apply to "the entire period"). Rather, they were the subject of much negotiation. *See* Mr. Meehan WRT ¶ 9; RBX 5; RBX 6. The fact that the license fees in the BMI agreement were negotiated for a multi-year term rather than an annual term is far from fatal to Radio Broadcasters' fee proposal.

88. In any event, under any allocation of the simulcasting fee over the applicable years, Radio Broadcasters fee proposal to SoundExchange would result in fees that exceed those which are paid for the musical work performance right. *See* RB PFF ¶¶ 307-308.

### D. BROADCASTERS PROPOSED 4% GROWTH RATE IS LARGER THAN THE ACTUAL GROWTH RATE NEGOTIATED FOR AM/FM STREAMING WITH ASCAP.

89. SoundExchange claims that the 4%-per-year growth rate included in Radio Broadcasters' fee proposal should not be adopted because, SoundExchange claims, it is based not on simulcast royalties alone, but "on the increase in overall fees (over-the-air and streaming)." SX PFF ¶ 1474.

90. While it is certainly true that the overall increases provided the initial basis for the 4% growth rate, Mr. Meehan's testimony confirms that the rate was actually higher than the growth rate agreed for 2006 through 2009 by ASCAP and the RMLC for

streaming alone. The 2006 industry-wide simulcast fee payable to ASCAP was the same as the similar number for BMI: $650,000. *See* Mr. Meehan WRT ¶ 10; 11/13/06 Tr. 117:3-8 (Meehan); Halyburton WDT ¶ 47; RBX 5. For 2007, ASCAP and the RMLC specifically negotiated a streaming royalty of $675,000, for 2008 they negotiated $700,000, and for 2009, it was $725,000. Meehan WRT ¶ 11. These numbers represent a 3.8% increase from 2006 to 2007, a 3.7% increase from 2007 to 2008, and a 3.6% increase from 2008 to 2009. Thus, the 4% annual increase proposed by Radio Broadcasters is actually more generous to SoundExchange than what ASCAP and the RMLC agreed to.

### E. A FLAT FEE IS WHOLLY CONSISTENT WITH EVIDENCE OF DIGITAL MUSIC DEALS AND PERFORMANCE LICENSE DEALS.

91. SoundExchange claims that a flat fee is inappropriate because it is "inconsistent both with what willing buyers and willing sellers agree to with respect to digital music services and is inconsistent with the Broadcasters' payments for other services in the marketplace." SX PFF ¶ 1475. This proposition is demonstrably false.

92. First, an interactive digital music service is a very different business than a terrestrial radio station, with different inputs, different types and levels of music use, different costs, and different factors driving revenue generation. They therefore would not necessarily agree to the same type of a deal as a willing buyer in a competitive marketplace. But even putting that fact aside, a flat fee is not "inconsistent with what willing buyers and willing sellers agree to with respect to digital music services." SX PFF 1475. The evidence confirms that record companies, and even SoundExchange have agreed to flat fee agreements voluntarily on more than one occasion – a voluntary license,

between UMG and Yahoo! and the SDARS agreement. *See* 6/7/06 Tr. 180:15-184:6, 285:6-286:2 (Kenswil); Joint D-RB PFF Part III.D.7.

93. Second, the ASCAP and BMI agreements themselves are evidence of what Radio Broadcasters as willing buyers and copyright licensing collectives as willing sellers would agree to for "other services in the marketplace." And those agreements reflect the closest possible transaction to a license for the digital performance of sound recordings.

94. SoundExchange suggests that Radio Broadcasters do not pay flat fees for bandwidth, and therefore they should not pay a flat fee for a license to perform sound recordings. SX PFF ¶ 1475. But SoundExchange is wrong again. Mr. Coryell of Bonneville (the very witness SoundExchange quotes to make its point), for example, pays a flat fee for his bandwidth. *See* 7/27/06 Tr. 95:10-97:13 (Coryell). He pays additional charges if he exceeds his guaranteed capacity, but in that respect, bandwidth is not like intellectual property. It imposes incremental costs on the bandwidth provider to send more data over the Internet; it does not cost SoundExchange or the record labels any incremental amount to additional songs performed over the Internet. *See* 5/3/06 Tr. 63:7-9 (Griffin) (testifying that the marginal cost of digital distribution of music is zero). Therefore, SoundExchange's arguments against Radio Broadcasters' flat fee model are baseless.

## V. SOUNDEXCHANGE MISAPPLIES THE STATUTORY CONSIDERATION OF ITS AND THE SERVICES' CONTRIBUTIONS.

95. As acknowledged by SoundExchange (SX PFF ¶ 1039), 17 U.S.C. § 114(f)(2)(B) states specifically requires that the Judges consider "the relative roles of

the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk," in determining the proper rate in this proceeding. SoundExchange's proffered findings of fact (SX PFF Part X), however, seem to ignore the language of the statute by discussing only the contributions of the record companies, failing to address any contribution by Radio Broadcasters as "the transmitting entity in the copyrighted work," who ensures the "the service [is] made available to the public," through AM/FM streaming makes any creative or economic contribution in providing that service. See 17 U.S.C. § 114(f)(2)(B). A proper application of the statute requires the Judges to make a relative comparison of the roles of the service and the copyright owners. Joint D-RB PCL Part II.B.2.a.

96. As discussed at length in RB PFF Part V, Radio Broadcasters make significant technical and financial contributions and incur risk related to AM/FM streaming; the record companies do not. Moreover, Radio Broadcasters make enormous creative contributions to the programming they transmit. SoundExchange's focus on the Radio Broadcasters' contribution to the creation of sound recordings ignores the fact that the creation of the sound recording is only part of the equation and the Radio Broadcaster's creative and technological contributions to the development and implementation of AM/FM Streaming must be considered. See Joint D-RB PCL Part II.B.2.

97. SoundExchange's assertion in SX PFF ¶1053 that Radio Broadcasters make no technological contribution to streaming is absurd. Just as the record labels themselves did not develop and manufacture the software and recording equipment that

they use to create a sound recording, the broadcasters themselves may not have specifically written all of the internet software that is used to transmit the music over the internet . Radio Broadcasters, however, have made significant technological and financial contributions to the development and implementation of AM/FM Streaming by investing in and creating methods to make the sound recording available in a streaming format (RB PFF ¶¶ 108-109), deploying and working to developing sophisticated technology for in-stream advertising and reference links that promote sale of the sound recording (RB PFF ¶¶ 110-111) and investing in the cutting edge equipment and software that make streaming possible (RB PFF ¶¶ 112-113). Moreover, the Radio Broadcasters, unlike SoundExchange, incur significant operating costs and assume all the risk of using the new and ever-changing technologies involved in streaming. RB PFF ¶¶ 114-121.

98. The Record Labels make no contribution to AM/FM streaming, nor, as can be seen in SoundExchange's proposed findings of fact, can they even purport to make any such contributions. *See generally* SX PFF Part X. All of the creative efforts in producing the streaming music is done by the Radio Broadcasters, including the development of on-air talent, programming of the music content, and development of the webpage experience. *See* RB PFF Part V.C.

### A. THE APPROPRIATE CONSIDERATION IS THE MARGINAL CONTRIBUTION RELATED TO THE PROVIDING OF SOUND RECORDING OVER AM/FM STREAMING.

99. As discussed in Joint D-RB PCL Part II.B.2, the Copyright Royalty Judges are required to base their decision "on economic, competitive and programming information presented by the parties, including ... the relative roles with respect to relative creative contribution, technological contribution, capital investment, and risk."

17 U.S.C. § 114(f)(2)(B). Therefore, the Judges should look only to the marginal contributions, expense and risk that the parties incur due specifically to their participation in the licensing of sound recordings for performance over AM/FM Streaming. Any contributions made and costs incurred by the Record Labels that would have been made or incurred regardless of the statutory license should not be considered in the Judges' analysis. *See* Joint D-RB PCL Part II.B.2. This would include any creative contribution in the creation of the sound recording (*see generally* SX PFF Part X.A), and administrative costs of the artists (SX PFF ¶ 1049) because such contributions were made principally with non-AM/FM streaming distribution channels in mind. *See* (Joint D-RB PCL Part II.B.2.c (discussing the proper contribution factors to be considered by the Judges).

100. Even to the extent that creation of the sound recording is deemed relevant, much of SoundExchange's section on contribution is dedicated to the irrelevant efforts of the record labels in the production and manufacturing of digital media and CD formats for distribution, including, among other things, the creation of packaging, promotion of record sales, and overhead related to all of the foregoing. *See* SX PFF Part V.B.2. These contributions and costs, however, are wholly unrelated to Internet streaming; they are related to an entirely different means of exploitation--physical distribution. They are irrelevant to the analysis in this proceeding.

### B. CONTRIBUTION TO THE CREATION OF A MUSICAL WORK IS NOT A PROPER CONSIDERATION UNDER THE STATUTORY LICENSE FOR THE SOUND RECORDING COPYRIGHT

101. SoundExchange misleadingly includes in its proposed findings of fact and conclusions of law as contributions attributable to the creation of the sound recording, the

efforts costs and risks that are attributable to the creation of the musical work. *See e.g.* SX-PFF ¶¶ 1043, 1046, 1047, 1052 and Part X.B.2.

102. SoundExchange claims that the transformation of a song through the artistic process is evidence of the creative contribution to the sound recording. SX PFF ¶ 1043. As discussed above, and in the Joint D-RB Findings and Conclusions, Part II.B.2.c, however, such contributions are irrelevant as they are not specifically done for purposes of AM/FM Streaming or other Internet streaming. Moreover the changes implemented by the artists often are so significant that they are not longer attributable to the sound recording, but themselves become unwritten musical works. For example, if artists or performers make significant changes to a song – e.g. creating a new arrangement – whether written or not, this is the creation of a new musical work which is covered by a wholly separate and distinct copyright not at issue in this proceeding.

103. In fact, SoundExchange's own example of the creative contribution to a sound recording demonstrates how SoundExchange has erroneously confused the creative efforts behind the musical work with those that are part of the creation of the sound recording. Mr. Bradley, a skilled guitar player (as cited by SoundExchange), transformed Willie Nelson's unsuccessful version of "Crazy" into a successful Patsy Cline recording, not by the application of Ms. Cline's vocal abilities, but rather by writing/composing the "perfect musical arrangement" for the song, "[adding] or [adjusting] elements of the song to give it an entirely new sound." SX PFF ¶ 1047. In other words, as Mr. Bradley acknowledged, he rewrote the song to make it successful, creating a different musical work through his creative contribution, not merely through his performance efforts. 05/10/06 Tr. 217:15-218:2 (Bradley) (testifying that he and the

other musicians composed a new version of "Crazy" in the studio); see also 05/10/06 Tr. 214:12-220:8 and 225:8-17 (Bradley).

104. As further purported evidence of the importance of the recording process and the specific artist to the success of a song, SoundExchange cites to the success of Lucinda Williams song Passionate Kisses. SoundExchange noted that while Ms. Williams first wrote and performed the song in 1988, it was not until Mary-Chapin Carpenter re-recorded the song in 1993 that it won a Grammy. The award, however, was not for Ms. Carpenter's performance of the song, but rather the Grammy was "for Ms. Williams [the composer] for Best Country Song in 1993." SX PFF ¶ 1046 (emphasis added). Even the Recording Academy acknowledged that the success of the song was due in large part the musical work.

105. Through these examples, SoundExchange attempts minimizes the contribution of the musical works authors to the success and, in fact existence of its sound recording rights. Without the musical work, there would be no sound recording. The musical works contributions, however relevant they are to the comparison of the value of the sound recording and the musical work, are not relevant to the comparison of contributions required under section 114(f)(2)(B)(ii). *See* Joint D-RB PCL Part II.B.2.

## VI. SOUNDEXCHANGE TWISTS THE RECORD TO SUPPORT ITS ARGUMENTS ABOUT THE PROFITABILITY AND FUTURE OF STREAMING FOR RADIO BROADCASTERS.

106. As described in more detail in Radio Broadcasters' Proposed Findings, Part X, when setting prices in competitive markets, it is inappropriate to look to the profitability of the parties or the allocation of the surplus between them. A 66-page

section of SoundExchange's Proposed Findings, however, is intended to show that because the webcasting market is becoming more profitable, willing buyers will be more willing to pay higher rates. *See* SX PFF ¶¶ 658-868. This section of SoundExchange's filing, of course, should be disregarded, as there is no reason to think that a profitable business would accept price hikes for all its necessary inputs. But, as a supplement to Radio Broadcasters' principal arguments which are contained in their original Proposed Findings, this section will address some of the inaccuracies presented by SoundExchange to support its misguided theory.

### A. THE EXISTENCE OF AD REP FIRMS IS NOT A SIGN OF MATURITY IN THE ADVERTISING MARKET FOR RADIO BROADCASTERS.

107. SoundExchange's first point is that the existence of advertising rep firms demonstrates the maturity and profitability of the webcasting market. SX PFF ¶¶ 662-669. At least in the case of Radio Broadcasters' experiences with ad rep firms, this is plainly not true.

108. Clear Channel, which used the ad rep firm Ronning Lipset Radio through 2006, realized a mere [[

]] 7/31/06 Tr. 217:2-7 (Parsons). These figures stand in stark contrast to the numbers cited by SoundExchange for Clear Channel's RLR sales, SX PFF ¶ 742 (stating that Clear Channel earned "[[ ]] in in-stream advertisements on Clear Channel streams and [[ ]] in banner ads through March 6, 2006). This is because, among other things, SoundExchange's numbers, unlike the numbers quoted by Mr. Parsons, do not take into account the exceptionally high [[ ]] sales commission RLR takes off the top. *See* 7/31/06 Tr. 217:10-16 (Parsons). By way of comparison, ad commissions for

over-the-air sales are generally in the range of 6%. Halyburton WDT ¶ 16. Even assuming that only 369 stations were streaming through that period (the number of Clear Channel stations streaming as of September 2005, Parsons WDT ¶ 9), that works out to an average of just over $100 per station per month. This is hardly a substantial revenue source for Clear Channel.

109. Bonneville's experience with Net Radio Sales, *see* SX PFF ¶ 665, has been even more dismal. Mr. Coryell testified that between the fall of 2005 and the end of July 2006, his three stations had earned a grand total of $600 from their relationship with Net Radio Sales. 7/27/06 Tr. 39:2 (Coryell). He testified of Net Radio, "They have not had great success in their endeavors to sell streaming, at least as far as the Bonneville stations, and I am familiar with also our efforts in Washington, which are similarly low." 7/27/06 Tr. 39:3-8 (Coryell).

110. Susquehanna has also used Net Radio Sales to try to maximize its streaming revenues, also to no avail. Mr. Halyburton testified that "there's very, very little of that business that we've seen. The prices of it are very low, but we have to pay them a very high percentage. . . . That business is really hard to find." 7/26/06 Tr. 43:9-14 (Halyburton).

### B. RADIO BROADCASTERS DO NOT USE AUDIENCE DEMOGRAPHIC INFORMATION TO TARGET ADVERTISING.

111. SoundExchange claims that webcasters, including Radio Broadcasters, tout their ability to reach particular desirable demographics on their streams. SX PFF ¶¶672-674. But the truth is far more mundane. For example, SoundExchange claims that Bonneville plugs the demographics of its audience to advertisers. SX PFF ¶ 673. But the

document referenced, SX Trial Ex. 86, is, in the words of Mr. Coryell, more "breathless hyperbole" than anything else. 7/27/06 Tr. 141:16 (Coryell). More importantly, he testified that even these exaggerated claims are not successful in convincing advertisers to sign up for the type of advertising it suggests. 7/27/06 Tr. 146:16-18 (Coryell).

112. More misleading is SoundExchange's characterization of the data collected by Clear Channel from user registrations on its web sites. SoundExchange refers to the oral testimony of Mr. Parsons to support its claim that services use the demographic information they collect to "target advertising specifically to specific consumers, thereby proving their reach to advertisers and increasing the value of the advertising." SX PFF ¶ 674. Mr. Parsons said no such thing. In fact, he said Clear Channel used the registration feature in an attempt to keep streaming local, 7/31/06 Tr. 232:21-233:4 (Parsons), and that the primary use of the information is to create e-mail mailing lists for Clear Channel's own use. 7/31/06 Tr. 233:21-234:3 (Parsons). Mr. Coryell also uses a registration on his stations, but he testified that their only purpose is to discourage listeners in an attempt to limit SoundExchange royalties. 7/27/06 Tr. 23:16-24-2 (Coryell).

### C. SOUNDEXCHANGE HAS MISCHARACTERIZED STATEMENTS OF RADIO EXECUTIVES.

113. SoundExchange apparently has no qualms about misquoting or quoting out of context statements of radio executives from public sources if it suits their purpose. For example, SoundExchange said, "According to Evan Harrison, the head of Clear Channel's online efforts, 'the no. 1 activity on the Web sites is listening to live streams.'" SX PFF ¶ 684. This statement was quoted in Mr. Griffin's rebuttal testimony, Griffin

WRT at 8, and it certainly is intended to look like a direct quote of Mr. Harrison. Indeed, Mr. Griffin had convinced himself that it was. But when confronted with a copy of the original article on cross-examination, he confessed that those are the words not of a Clear Channel official, but of the journalist who wrote the article. *See* 11/22/06 Tr. 212:3-215:14 (Griffin); Servs. Reb. Ex. 17. Nevertheless, just 20 days after Mr. Griffin's SoundExchange has once again put those words back into Mr. Harrison's mouth.

114. In addition, SoundExchange has quoted an article wherein Bonneville President and CEO Bruce Reese is alleged to have "said that the web offers 'the biggest opportunities' for radio stations, and that he anticipates that web-based revenue will grow from 2% of his revenues to 15%." SX PFF ¶ 736. In the first place, Mr. Reese's comments about the future of "the web" are not equivalent to comments about the future of streaming. The two are not the same thing. And secondly, SoundExchange forgot to mention that Mr. Coryell, Mr. Reese's employee, testified that he suspected that the article inaccurately reported the current percentage of Bonneville's revenues represented by the web. 7/27/06 Tr. 180:13-19 (Coryell).

### D. SOUNDEXCHANGE HAS MISREPRESENTED RADIO BROADCASTERS' STREAMING ACTIVITIES.

115. In addition, SoundExchange's claim that Radio Broadcasters are using side channels to capture additional audience is not supported by any evidence. *See* SX PFF 715. All of the citations to the record that SoundExchange provided simply show that a few Radio Broadcasters operate a very small number of side channels; they do not state any particular motivation for doing so.

116. SoundExchange also posits that Radio Broadcasters receive so much benefit from HD radio promotion that they often do not advertise on the HD simulcast side channels that they stream. *See* SX PFF ¶ 799. But, once again, SoundExchange has offered no facts to support this claim; instead, they only offer the unattributed testimony of Mr. Griffin. *See* Griffin WRT at 7. In fact, Mr. Griffin admitted that the reason Radio Broadcasters do not sell advertising on HD channels, and therefore their simulcasts, is that the entire national audience for HD broadcasts is about 500 to 10,000 people – hardly enticing to an advertiser. 11/22/06 Tr. 212:7-13 (Griffin).

117. According to SoundExchange, Radio Broadcasters say streaming is a defensive move "to keep audience from listening to other webcasters" and a new revenue stream. *See* SX PFF ¶ 788; *see also* ¶ 1109. However, there is no evidence in the record of any Radio Broadcaster claiming that it engages in AM/FM streaming in order to keep its listeners from listening to other webcasts. In fact, Mr. Coryell stated that the intangible benefits of AM/FM Streaming include brand loyalty and maintaining a connection to listeners while they are at work; however, when asked specifically if it is to keep the station's audience from listening to something else, Coryell stated that he "wouldn't phrase it that way," as the goal is "to please that community of customers by providing a needed service." 7/27/06 Tr. 182:19-183:22 (Coryell). Mr. Halyburton stated that if AM/FM streaming has any defensive purpose at all, it is to prevent a station's listeners from listening to other AM/FM streams because the over-the-air market "is really our primary business." 7/26/06 Tr. 103:1-104:12 (Halyburton). Mr. Parsons agreed that streaming is simply a way of "help[ing] the station serve its local audience better," never mentioning that it was to prevent the loss of listeners to other webcasters.

7/31/06 Tr. 39:8-40:13 (Parsons). In fact, the only place that any "facts" come in to support SoundExchange's position is in the written rebuttal testimony of Mr. Griffin. However, the citations to his testimony provided in SoundExchange's Proposed Findings refer only to Mr. Griffin's bald assertions that Radio Broadcasters stream to compete with Internet-only webcasters or satellite radio services, which are supported by no citations or other evidence. *See* Griffin WRT at 6, 50-51; 5/2/06 Tr. 165:15-169:18 (Griffin).

118. Despite what SoundExchange states, there is no evidence that Radio Broadcasters are "spending significant sums on television to persuade people to listen to their webcasts." SX PFF ¶ 860. In all, there was testimony regarding a grand total of two very similar television commercials run by Bonneville's KOIT and Clear Channel's WASH. *See* SX Ex. 217 RP (videos of the two commercials). A simple viewing of the commercials reveals that they encourage people to listen at work, but do not specifically promote the station's stream. In fact, rather than give the Internet URL information a listener would need to access the Internet stream, both commercials instead provide the over-the-air frequency number so listeners can tune to the station on their FM radios at work. *See also* 7/27/06 Tr. 248:17-253:1 (Coryell) (specifically stating that the intent of KOIT's commercial was to get people to listen to the over-the-air broadcast, as that is "how we make our money").

119. Similarly, the "facts" showing that Radio Broadcasters are attempting to rapidly grow their streaming listenership misstate the record or are overgeneralizations. *See* SX PFF ¶¶ 861-863. First, it is clear that Bonneville's inclusion on the Shoutcast index was a mistake, and was simply a by-product of using Shoutcast software in Bonneville's streaming operations. *See* 7/27/06 Tr. 136:21-137:138:14 (Coryell).

Second, the facts reflect that a total of two Bonneville stations have increased their simultaneous listening caps, and those caps have only moved upward after careful deliberation and analysis of budgetary constraints in hopes of improving the currently "frustrating and dismal" advertising market for streaming. *See* 7/27/06 Tr. 89:1, 219:16-221:22 (Coryell). And although Bonneville increased the number of consecutive hours that a person can listen to a Bonneville stream without having to log back in, Mr. Coryell explained that the limit "serves the same purpose, and perhaps I get less complaints." 7/27/06 Tr. 233:14-15 (Coryell).

### E. SOUNDEXCHANGE HAS MISCHARACTERIZED RADIO BROADCASTERS' STREAMING FINANCES.

120. SoundExchange would like the Judges to think that Radio Broadcasters are making money hand-over-fist due to stream listeners visiting Radio Broadcasters' websites more often than those who do not listen to the stream, *see* SX PFF ¶ 780, and that Radio Broadcasters "refuse to allocate revenue from banner ads even though the evidence is clear that streaming drives users to their websites." *See* SX PFF ¶ 817. The fact of the matter, however, is that "the streaming audience is small" and "[a] lot of times what we're seeing is they actually bookmark the stream and they bypass the website completely just to get to the stream so it's really hard to quantify the method by which they get there. They don't take the same five steps or whatever it is to get to the streams as they do the first time." 7/31/06 Tr. 47:13-14, 48:2-9 (Parsons).

121. And at any rate, SoundExchange's discussion of Radio Broadcasters' finances is tainted by the presentation of the numbers largely in terms of percent growth

rates. *See generally* SX PFF ¶¶ 737-747. Going from a nickel to a dime is a 100% increase, but you're still only left with a dime.

122. In light of this situation, of course, it is downright laughable to even suggest, as SoundExchange has done, that Radio Broadcasters' streaming revenues "will approach the over-the-air advertising market." SX PFF ¶¶834-835. To do so, based on the figures presented by Mr. Halyburton, Radio Broadcasters will have to increase their streaming business by nearly 37,000 percent. Even assuming Radio Broadcasters maintain the current growth rates of their streaming business, it will take them far longer than the period of this license to achieve that lofty goal.

## VII. SOUNDEXCHANGE PRESENTS CHERRY-PICKED AND DISPROVEN EVIDENCE IN SUPPORT OF ITS PAYMENT TERMS AND ITS DISCUSSION OF CENSUS REPORTING.

### A. SOUNDEXCHANGE'S CHERRY-PICKED CITATIONS TO ALLEGED "MARKETPLACE" EVIDENCE IN SUPPORT OF ITS PROPOSED TERMS ARE MISLEADING.

123. Throughout the "Terms" section of its Proposed Findings, SoundExchange repeatedly cites to selected record label agreements proffered by SoundExchange as proposed benchmarks in support of one or more of its proposed modifications to the existing terms. *See* SX PFF Part XII. Repeatedly, it claims that such agreements constitute "marketplace" evidence that the Judges should consider when setting terms. *See, e.g.,* SX PFF ¶¶ 1276, 1304. What SoundExchange fails to mention, however, is that it is only telling part of the story. A review of the agreements provided by the record companies, specifically exhibits SX Ex. 001-022 DR and SX Ex. 001-017 RR ("the record company agreements"), revealed that SoundExchange culled out the agreements that support its position while failing to mention the many agreements that

incorporate existing terms that DiMA and Radio Broadcasters seek to retain. Thus, putting aside the irrelevance of these agreements as proffered benchmarks, which DiMA and Radio Broadcasters have demonstrated elsewhere in their Proposed Findings and Conclusions, at a minimum, the agreements undercut SoundExchange's own positions concerning various terms that it seeks. In fact, each of the four major record labels have entered into many agreements that support the existing terms in lieu of terms that SoundExchange now seeks to impose.

124. For example, SoundExchange cites two agreements to support its assertion that "[m]arketplace agreements between record companies and digital music services regularly require significant reporting of both the number of performances made and the revenue in order to permit a copyright owner to verify the royalty calculations owed under the agreement." SX PFF ¶ 1304.

125. Both of the agreements SoundExchange cites, however, include confidentiality provisions that explicitly cover reporting information. [[

]].

126. Indeed, the overwhelming majority of the record company agreements include provisions specifically designed to maintain the confidentiality of payment

reporting information. For instance, [[

]]

127. Moreover, each of the four major record labels has entered into agreements that expressly include confidentiality provisions that protect their licensees' confidential business information. *See e.g.*, [[

]].

128. There is also ample support among the record label agreements for preserving the 10% underpayment threshold at which audit costs are charged to the audited party – although, of course, those provisions are nowhere to be found in SoundExchange's Proposed Findings. SX PFF ¶¶ 1313, 1343-45. Indeed, fully three of the four major record labels have entered into agreements that provide for [[

]] in just the small universe of documents introduced by SoundExchange as affirmative evidence. *See* [[

]].

129. SoundExchange's label members also have freely entered into agreements requiring that auditors be Certified Public Accountants despite its own attempt to relax that provision. SX PFF ¶ 1328; [[

]].

130. Despite SoundExchange's attempt to qualify auditors who are only independent of the licensee (SX PFF ¶ 1314), many of the record label agreements require an auditor to be independent of both parties. *See e.g.*, [[

]].

131. SoundExchange's attempt to impose late fees on fully paid licensees whose statement of account is deficient in some respect also is undermined by its own proffered "benchmark" agreements. Indeed, the vast majority of the record company agreements, including several agreements by each of the four major record labels, impose no penalty for not submitting a completed report. *See e.g.*, [[

]].

132. Finally, SoundExchange's agreements also support Radio Broadcasters' position that the regulations should require SoundExchange to provide notice and a period to cure. Indeed, nearly every one of SoundExchange's agreements include such a provision. For example, [[

]]. In addition, [[

]].

133. In sum, while these voluntary agreements should not serve as fee benchmarks in this proceeding for reasons explained elsewhere, at a minimum they undercut SoundExchange's own position by showing that many of its own members – including major label members – repeatedly have agreed to terms provisions in line with existing terms that SoundExchange now seeks to change. SoundExchange's terms positions should be viewed against this backdrop.

### B. SOUNDEXCHANGE IGNORES THAT ITS OWN PREDECESSOR, RIAA, EXPRESSLY AGREED TO EACH OF THE TERMS IN 2001 THAT SOUNDEXCHANGE NOW SEEKS TO CHANGE AND THAT SOUNDEXCHANGE IN 2003 AGREED TO EXTEND THOSE TERMS.

134. While SoundExchange selectively cites to certain label agreements in support of its terms proposal, it ignores that its own predecessor, RIAA, agreed in 2001 to all of the terms that SoundExchange now seeks to change. *See* CARP Report at 130-31. Barrie Kessler, the main proponent on SoundExchange's behalf, was even one of several witnesses who provided "[e]xtensive evidence in support of many of the terms." *Id.* at 131.

135. In 2003, SoundExchange itself agreed to extend those terms. *See* 69 Fed. Reg. 5693, 5694 (Feb. 6, 2004). SoundExchange and RIAA could not have believed the terms to be too onerous; otherwise, it would not have agreed to those terms to apply to over a six-year period.

### C. SOUNDEXCHANGE'S CLAIM THAT THE CURRENT LATE PAYMENT PENALTIES ARE INADEQUATE IS BELIED BY THE EVIDENCE.

136. SoundExchange's claim that it "provided evidence from Barrie Kessler, based on the actual experience of administering the statutory license, which demonstrated that the current provisions for late fees are insufficient to compel licensees to make payment" borders on the absurd. SX PFF ¶ 1246. As DiMA and Radio Broadcasters demonstrated in their Joint Proposed Findings and Conclusions, the top ten webcasters and simulcasters, who in 2004 represented over [[ ]] of all royalty payments and who Ms. Kessler conceded during her rebuttal cross-examination represented the "vast majority" of such payments, have been only one day late on average over the past two

years and have actually paid prior to the due date over the past year. *See* Joint D-RB PFFCL ¶ 292; Servs. Ex. R-37. Particularly where licensee payments are getting earlier, not later, there is absolutely no reason to harshen the late fee penalties beyond their current level.

137. SoundExchange points to Entercom's license agreement with SESAC as an agreement with a [[ ]] provision. SX PFF ¶ 1270; SX Trial Ex. 166, at LEVIN0000002. What SoundExchange does not say, however, is that that [[ ]] provision is [[ ]] and that Entercom is given a full [[ ]]. SX Trial Ex. 166, at LEVIN0000002. By contrast, no [[ ]] period is set forth in the most recent section 114 terms. *See* 37 C.F.R. § 262.4(e) ("Late fees shall accrue from the due date until payment is received by the Designated Agent." (emphasis added)).

138. SoundExchange also points to Entercom's bandwidth agreement with Liquid Compass as an agreement with a 1.5% per month late fee provision SX PFF ¶ 1272; SX Trial Ex. 165, at LEVIN0000144. Tellingly, however, SoundExchange fails to acknowledge that the provision that the late fee is discretionary – *i.e.*, "may be charged" – and cannot apply at all until fully 30 days past the due date. SX Trial Ex. 165, at LEVIN0000144.

139. SoundExchange makes much of the notion that "SoundExchange is unable to select its business partners" (presumably suggesting that it should receive more favorable terms). SX PFF ¶ 1273. But the flip side is also true – services have no commercially feasible business options if they would like a blanket license to webcast or

stream under the sections 112 and 114 statutory licenses than to deal with SoundExchange. If SoundExchange is overreaching or unreasonable, the services have no alternative business partners with whom they can deal if they would like access to the full repertory of sound recordings.

140. SoundExchange's late fee proposal is particularly unreasonable in that it seeks to apply late fees to even fully paid-up licensees if they have made some minor error in completing their statements of account. While SoundExchange suggests that it needs accurate and complete statements of account to assist it in making distributions, that is function of the notice and recordkeeping reports of use, not the payment reports. SX PFF ¶ 1285. As discussed above, [[ ]] of the agreements proffered by Dr. Pelcovits as benchmarks charge late fees for mere reporting errors.

### D. SOUNDEXCHANGE'S PROPOSAL TO STRIP STATEMENTS OF ACCOUNT OF ALL CONFIDENTIALITY PROTECTION AND TO SHARE LICENSEE-SPECIFIC INFORMATION WITH ITS COPYRIGHT OWNERS IS UNNECESSARY AND INVITES ABUSE BY THE LABELS.

141. It is particularly ironic for SoundExchange to assert that the services' statements of account should be made public when virtually all, if not all, of its own proffered benchmark agreements include [[ ]]. SX PFF ¶ 1301. Licensees and licensors in normal business relationships often have to provide confidential information to one another, and there is no reason to force the licensees to disclose their confidential information to the public here.

142. Nor should copyright owners be entitled to review the services' confidential reporting information, as SoundExchange seeks. SX PFF ¶ 1292. They

already are entitled to review royalty payment information in the aggregate, which should serve them well for budget planning purposes. 37 C.F.R. § 262.5(c). They also already are entitled to know the identities of services who are delinquent in royalty payments, which should assist them in enforcement determinations. *Id.*

143. While SoundExchange suggests direct licensing as an option for services who wish to preserve the confidentiality of their reporting information, that practice has been rare, to say the least.

### E. SOUNDEXCHANGE'S CLAIM THAT IT HAS EXPERIENCED NOTHING BUT OBSTRUCTION WITH RESPECT TO CONDUCTING AUDITS IS UNEQUIVOCALLY FALSE AS TO RADIO BROADCASTERS.

144. SoundExchange claimed in the rebuttal statement of Barrie Kessler that "[w]ithout exception, SoundExchange has met with delays, resistance, and recalcitrance by webcasters," a claim that it echoes in its findings. Kessler WRT at 8; SX PFF ¶ 1338. As demonstrated during Ms. Kessler's rebuttal cross-examination, however, that claim is unequivocally untrue as to Radio Broadcasters. As to them, the shoe is on the other foot; it is SoundExchange who has protracted the audit process for months, with broadcasters hearing nothing at from SoundExchange for the better part of a year after receiving notice of the audit, as explained below.

145. On December 23, 2005, SoundExchange gave notice of its intent to audit three radio broadcasters – Bonneville, Clear Channel and Cox Radio. 11/28/06 Tr. 78:11-79:11 (Kessler). Bonneville received no further communications from SoundExchange for nearly nine months, until September 20, 2006, when SoundExchange sent Bonneville a letter requesting to change auditors. Servs. Reb. Ex. 39; 11/28/06 Tr.

80:9-81:7 (Kessler). Bonneville responded to SoundExchange's letter on October 3, 2006, less than two weeks after SoundExchange mailed its request. 11/28/06 Tr. 84:4-9, 85:3-8 (Kessler). Bonneville's prompt response can hardly be characterized as delay.

146. Like Bonneville, Cox Radio did not receive any further communications from SoundExchange until September 20, 2006, nine months after receiving the December 23, 2005 initial audit notice. Servs. Reb. Ex. 41; 11/28/06 Tr. 86:4-13 (Kessler).

147. SoundExchange did not communicate with Clear Channel until August 14, 2006, nearly eight months after sending the notice of intent to audit. Servs. Reb. Ex. 42; 11/28/06 Tr. 87:14-88:3 (Kessler). Clear Channel responded to SoundExchange's letter requesting to change auditors on August 17, 2006, only three days after the date of the request. Servs. Reb. Ex. 43; 11/28/06 Tr. 89:11-90:2 (Kessler). KPMG, the selected auditor, sent Clear Channel a letter on September 8, 2006, which included a detailed, six page questionnaire having forty questions. Thus, at the time when Ms. Kessler first made her sweeping assertions about audit obstruction and delay in late September of this year, Clear Channel had already responded to one audit-related inquiry, had just received an extensive questionnaire earlier that month, and was preparing responses. 11/28/06 Tr. 91:19-92:7 (Kessler). Such conduct is a far cry from the "delays," "recalcitrance," and "resistance" of which SoundExchange accuses the audited licensees.

## F. CONTRARY TO SOUNDEXCHANGE'S ARGUMENT, ITS PRIOR AUDITS OF MUZAK AND MUSIC CHOICE DEMONSTRATE THAT THE CURRENT AUDIT PROVISIONS ARE EFFECTIVE IN ENSURING COMPLIANCE WITH THE STATUTORY LICENSE AND THAT MODIFICATIONS WOULD INVITE ABUSE FROM COPYRIGHT OWNERS.

148. SoundExchange's claims that its heightened audit provisions are necessary to ensure compliance with the statutory license are belied by the evidence on the record. SoundExchange claims that "The existing audit provisions have not been successful in ensuring accurate payment of statutory license fees. Licensees have been uncooperative and, to the extent audits have been conducted, they show significant underpayments." SX PFF ¶ 1312. But the history of audits that have taken place shows that this claim rings hollow, and what is more, invites abuse of services.

### 1. Changes to the Cost-Flipping Measure Are Not Necessary To Discourage Underpayment.

149. SoundExchange claims, for example, that the current cost-flipping measure, which puts the cost of the audit on the licensee if an underpayment of 10% or more is found, gives services an incentive to underpay by 9%. SX PFF ¶ 1336; Kessler WRT at 8. Yet SoundExchange has offered no evidence to show that this is in fact what licensees do. Rather, the evidence shows that there is no such incentive.

150. In November of 2005, SoundExchange completed an audit of the pre-existing subscription service Muzak's operations for the years 2001 to 2003. 11/28/06 Tr. 96:17-97:3 (Kessler); Servs. Reb. Ex. 45. The result of the audit showed an undisputed underpayment amount of [[ ]] out of a total royalty payment of [[ ]]. Servs. Ex. 45. Contrary to SoundExchange's claims that significant underpayment will result unless the cost-flipping threshold is lowered, Muzak's

undisputed underpayment amounted to about [[ ]] of the total amount – [[ ]]. 11/28/06 Tr. 135:21-136:1 (Kessler).

151. Likewise, in SoundExchange's recently completed audit of Music Choice, the undisputed underpayment amount was found to be [[ ]] out of a total royalty of [[ ]], or about [[ ]]. 11/28/06 Tr. 148:8-149:11 (Kessler). Clearly, even under a cost-flipping threshold of 10 percent, services are not purposely underpaying just enough to get away with paying for their audits. SoundExchange's characterization of the Music Choice underpayment as a grievous offense, SX PFF ¶ 1337, is belied when put into the context of the overall payment amount.

152. Apparently for the very first time, SoundExchange has added another draconian feature to its cost-flipping proposal. In addition to a request that the cost of the audit flip to the licensee if a 5% underpayment is found, SoundExchange is now asking the Judges to adopt a regulation that would also flip the cost of the audit if a $5000 underpayment is found, regardless of the size of the overall payment. SX PFF ¶1342. This provision is even more egregious than the 5%, because it subjects large webcasters to extreme risk of being charged for the audit when their underpayment is a very small percentage of the overall payment. There is no reason to adopt an absolute value above which the cost of the audit flips to the licensee.

### 2. SoundExchange Abuses Its Audit Power.

153. Giving SoundExchange more power in its audit function would be unwise, based on its track record with conducting audits, because it has shown a

dangerous propensity to meddle with the internal affairs of licensees through its audits, particularly in a situation where SoundExchange enjoys a percent-of-revenue metric.

154. For example, [[

155.

]]

### 3. Giving All Interested Parties Audit Power Will Be Extraordinarily Burdensome for Licensees.

156. Incredibly, SoundExchange now proposes that each and every copyright owner, out of the hundreds of individual copyright owners, and each and every performer, out of the thousands or potentially millions of individual featured and non-featured performers, be granted independent audit rights of the services equal to SoundExchange. SX PFFCL ¶ 1334. This is a sure-fire recipe for disaster. To say that subjecting a service to perhaps thousands of simultaneous audits throughout the year would be unduly burdensome is an understatement. The services would likely be crippled.

157. SoundExchange claims that this provision is necessary, since copyright owners and performers "are the beneficiaries of the statutory license payments." SX PFF ¶ 1334. But such a provision discounts SoundExchange's role as a licensing collective. If a particular copyright owner or performer has reason to believe that there has been an underpayment, he or she can request SoundExchange to perform the audit, and offer to reimburse the cost. Allowing every interested individual to audit the services would be unnecessary and disruptive – particularly if the licensee also had to deal with the risk of paying for all these audits if there was an underpayment of only 5% or $5000.

## G. SOUNDEXCHANGE CONTINUES TO RELY ON FALSE OR ERRONEOUS STATEMENTS BY MS. KESSLER IN SUPPORT OF ITS ARGUMENT FOR CENSUS REPORTING, DESPITE MS. KESSLER'S EXPRESS ACKNOWLEDGMENTS DURING CROSS-EXAMINATION THAT HER STATEMENTS WERE UNTRUE.

158. In support of its request for census reporting, SoundExchange continues to rely on evidence from its Chief Operating Officer, Ms. Kessler, that Ms. Kessler

admitted was incorrect during her cross-examination and remains false today. Specifically, SoundExchange asserts that it analyzed two weeks of a calendar quarter of census data supplied by XM Satellite Radio Inc. and determined that "over 40 percent of the artists performed in the census were not picked up by the sample. SX PFF ¶ ¶ 1232-33.

159. During her oral testimony, Ms. Kessler provided the exact same figures and – after first being unable to locate where in her testimony the sample study was set forth – eventually testified that the study appeared in SX Ex. 417 DP, beginning on page 9. 6/6/06 Tr. 148:19- 149:14 (Kessler); 6/8/06 Tr. 112:11-116:3, 257:9-258:10 (Kessler).

160. When Ms. Kessler was confronted with the actual study set forth in that exhibit, however, she admitted that the study did not, in fact, collect data from two seven-day periods but rather for much lesser periods of time – namely, one day, three days, and seven days. 6/8/06 Tr. 274:6-20 (Kessler). She also admitted that nowhere did the study report that over 40% of artists performed were missed in a sample of two seven-periods in a quarter. 6/8/06 Tr. 275:16-22 (Kessler).

161. In fact, the results reported in the study that Ms. Kessler identified were (a) significantly more accurate than she had claimed during her direct testimony even though (b) they were based on a sample period of one-half or less the size of the two seven-day period she had identified. *See* SX Ex. 417 DP at 9-10.

162. Moreover, the numbers reported in SoundExchange's sample study do not even account for the facts that:

(a) the study analyzed at most only one-half of the sample period required by the Judges recordkeeping regulations;
(b) XM is a multi-channel service transmitting a very broad variety of sound recordings and not a radio simulcaster, which draws music from far narrower playlists, and songs are repeated frequently;
(c) SoundExchange did not analyze any data from any radio simulcasters;
(d) the study only analyzed the results from a single webcaster instead of sample results across all webcasters who would be reporting data, which would increase the sample size and therefore the accuracy of the data; and
(e) the study analyzed only a single period of time instead of multiple periods, which again would increase the data's accuracy.

6/8/06 Tr. 107:3-5, 110:14-111:20 (Kessler); Servs. Ex. 96 at 3; Parsons WRT ¶ 8.

163. In sum, either Ms. Kessler offered false or erroneous testimony when asserting the study results, or she offered false or erroneous testimony in stating that the results reflecting the number she had cited were attached to her statement as an exhibit. Either way, her testimony on this issue is simply not credible and should be disregarded.

## H. SOUNDEXCHANGE'S OTHER ARGUMENTS IN SUPPORT OF CENSUS REPORTING ARE WITHOUT MERIT.

164. SoundExchange also purports to rely on alleged "[m]arketplace agreements" that it claims require census reporting. SX PFF ¶¶ 1236-37, 1239. Not a single license agreement identified by SoundExchange, however, covers an AM/FM Streaming service. Rather, all but one are with Internet-only companies. SX PFF ¶ ¶ 1236-37, 1239.

165. While SoundExchange cites an agreement with Clear Channel, it is for a [[ ]], not for AM/FM Streaming. Mr. Parsons confirmed that that agreement has nothing to do with streaming but "relates to having [[ ]], and that "the systems designed within Clear Channel to accomplish [[ ]] [are] different than the radio broadcaster systems" Clear Channel uses. 11/14/06 Tr. 135:7-136:3 (Parsons).

Moreover, that agreement is for [[ ]], so far fewer [[ ]] than the typical number of songs per hour transmitted on an AM/FM Streaming service would be transmitted. SX Trial Ex. 169, at SX33690.

166. The sole other agreement with a radio simulcaster, Entercom, was with its bandwidth provider and has nothing to do with reporting playlist information. SX Trial Ex. 165.

167. SoundExchange points to the statutory display requirement of title, artist, and album information as apparent evidence that licensees should provide census reporting. SX PFF ¶ 1226. This display requirement, however, ignores the detailed recordkeeping format requirements with which licensees must comply when they are reporting music use information, but are inapplicable to the statutory display requirement. If census reporting were imposed, licensees would still be forced to re-format each and every line of data to comply with the Copyright Royalty Judges' regulations, which would be far more burdensome than if sample reporting is preserved. 11/14/06 Tr. 137:15-138:14 (Parsons).

168. Moreover, the recordkeeping regulations require services to report label information if in their possession at the time of the transmission, which the display requirements do not. *Compare* 69 Fed. Reg. 11515, 11524, 11529 (Mar. 11, 2004) (requiring services to report label information if it is "in their possession, or was supplied to them by the marketing label, at or before the time the performance of the sound recording is made") *with* 17 U.S.C. § 114(d)(2)(C)(ix) (requiring display of title, artist, and phonorecord information during transmission of sound recording).

169. In addition, at least some radio stations comply with the display requirement not by obtaining the required information from their own systems but rather by locating some of the information from external sources; in such instances, it is problematic to attempt to download that information into the radio stations' system for later reporting to SoundExchange. For example, Mr. Parsons testified that when Clear Channel complies with the statutory display requirement, it often does not have album information and must "go[] out to do anInternet search to find the album on our ecommerce partner." 11/14/06 Tr. 131:11-21 (Parsons). Mr. Parsons further explained that that "information cannot be pushed down into the system that we use for reporting. It's a one-way connection." 11/14/06 Tr. 132:4-7 (Parsons).

170. SoundExchange admits that record companies have an ulterior motive in seeking census data – *i.e.*, to "assist record companies in marketing." SX PFF ¶ 1238. It further asserts that the "reporting that record companies have received under the statutory license is not sufficiently timely or detailed to provide any useful information to record companies for their marketing efforts." SX PFF ¶ 1238. This conversion of data provided under a statutory license for a private, for-profit purpose, however, is improper and flatly forbidden under the Judges' recordkeeping regulations. *See* 37 C.F.R. § 270.2(h) (forbidding disclosure of recordkeeping reporting information and barrage usage "for purposes other than royalty collection and distribution"). The Copyright Royalty Judges should retain these confidentiality and usage limitations and not allow the record companies to abuse the statutory license by using information received under the license for one purpose for an entirely different purpose.

## VIII. RADIO BROADCASTERS JOIN THE DIGITAL MEDIA ASSOCIATION MEMBER COMPANIES' OPPOSITION TO SOUNDEXCHANGE'S REQUEST FOR A SUPPLEMENTAL FEE FOR SERVICES TO PORTABLE DEVICES.

171. Radio Broadcasters join in the Digital Media Association member companies' opposition to a surcharge for streaming directed to portable devices as being without justification. Radio Broadcasters hereby incorporate by reference DiMA Proposed Findings of Fact and Conclusions of Law paragraphs 60-64; 66-72 and 74.

## RADIO BROADCASTER'S REPLY TO SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW

## I. SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW RELY ON FOUR FALSE PREMISES AND A MISAPPLICATION OF *STARE DECISIS*, THE CORRECTION OF WHICH EXPOSES THE IRREPARABLE FLAWS IN ITS CASE.

1. SoundExchange's Proposed Conclusions of Law depend on four demonstrably erroneous legal pronouncements that SoundExchange claims derive from the statute and prior determinations by the Librarian of Congress and prior CARPs. In fact, SoundExchange seriously misconstrues or mischaracterizes those decisions, most notably, the decisions of the CARP and the Librarian in Web I. Simply put, SoundExchange is wrong in multiple ways, and those errors undermine its entire case. Specifically, SoundExchange incorrectly asserts that:

- the Web I decisions require the Copyright Royalty Judges to adopt a hypothetical market infected with enormous market power; in fact, both the CARP and the Librarian recognized the need for a competitive market, consistent with the long judicial precedents in music licensing law establishing that a key function of rate-setting mechanisms is to ensure that competitive rates are arrived at;

- the Web I decisions require the Copyright Royalty Judges to adopt as the willing sellers the existing record labels regardless of how much market power they exert; in fact, the CARP and Librarian did nothing of the sort;

- the governing statute invites the Judges to consider – and places on an equal plane – not merely statutory agreements – where the market power of the negotiating collective is constrained by an external rate-setting mechanism – but also non-statutory agreements – where record labels exercise significant market power in demanding supra-competitive rates; and

- the Web I decisions require the Judges to reject as a matter of law the musical works benchmark, despite the Librarian's adoption of just such a benchmark in a prior section 114 proceeding and his conclusion in Web I that the use of such a benchmark is perfectly appropriate and depends on the record evidence adduced in a proceeding, and despite the evidence in this case that the musical works benchmark involves

  - the same buyers (broadcasters and webcasters);

  - the same type of seller (music licensing collective) in the same economic position;

  - the same right (digital public performance right); and

  - the same activity (webcasting and AM/FM Streaming).

2. SoundExchange bases its arguments on a wildly overbroad misconstruction of the doctrine of *stare decisis*, the adoption of which would deprive the Copyright Royalty Judges of any discretion in deciding cases.

3. As demonstrated below, each of these propositions is unsound. Once the correct legal principles are applied, the underpinnings of SoundExchange's entire case disappear.

## A. THE CARP AND LIBRARIAN IN WEB I MADE CLEAR THAT A HYPOTHETICAL COMPETITIVE MARKET WAS REQUIRED, NOT, AS SOUNDEXCHANGE WOULD HAVE IT, A MARKET INFECTED WITH MONOPOLY OR SUPRA-COMPETITIVE MARKET POWER.

4. Nowhere in SoundExchange's Proposed Conclusions does SoundExchange so much as give lip service to the Librarian's declaration in the Web I that the hypothetical marketplace in which the willing buyer willing seller standard is

considered must be competitive. As Radio Broadcasters repeatedly emphasized during opening arguments in this case and highlighted in their Proposed Conclusions of Law filed jointly with DiMA, the Librarian made crystal clear that the willing buyer willing seller standard must be analyzed in a competitive marketplace. Specifically, the Librarian ruled that rate-setting function under section 114(f)(2)(B) was to set "the rates to which, absent special circumstances, most willing buyers and willing sellers would agree in a competitive marketplace." *See* 67 Fed. Reg. 45240, 45244-45245 (July 8, 2002) (emphasis added) (internal quotation marks and citation omitted); Joint D-RB PCL ¶ 31.

5. SoundExchange also ignores the repeated determinations that the prior CARP took that made clear the CARP's view that the relevant hypothetical marketplace in which to apply the willing buyer willing seller standard was one without the exercise of significant market power. For example, the CARP flatly rejected 25 of the 26 agreements proffered by RIAA in that proceeding as "unreliable benchmarks" given the licensees' lower resources, sophistication, and market power compared to RIAA. CARP Report at 60.

6. The CARP, itself, further indicated that it would be reject a market that consisted of record companies exercising oligopolistic market power. CARP Report at 23. As demonstrated in the record here, the record companies exercise market power that exceeds that of an oligopoly. *See* Joint D-RB PFF, Part III.

7. As the U.S. Court of Appeals for the D.C. Circuit observed with approval, in affirming the Librarian's decision, "The CARP determined that the RIAA strategy was

targeted at supra-competitive licensing fees to conform with its view of the "sweet spot" for the royalty rates." *Beethoven.com LLC v. Librarian of Congress*, 393 F.3d 939, 943 (D.C. Cir. 2005). In other words, far from accepting the concept of a non-competitive marketplace, the Court of Appeals understood the CARP and the Librarian to have based their decisions on avoiding supra-competitive fees.

8. In the face of this clearly established and understood requirement of a competitive market, SoundExchange twists to reach a contrary result. First, it misleadingly pulls out of context an isolated statement from the prior CARP Report – which it quotes not once, but at least twice – that says "we see no Copyright Office or Copyright Royalty Tribunal precedent for the Services' 'competitive market' construct in the compulsory license context." *See* SX PCL¶ 20, 38.

9. What SoundExchange does not disclose, is that the CARP was not rejecting the notion of a "competitive" market, but rather was rejecting the particular competitive market construct advanced by the Services in that case—the notion of multiple competing collectives, each licensing the same catalog, as willing sellers. Indeed, the section in which this statement appears begins by observing that "the parties[]' bitterly dispute the identities of the 'sellers' in this hypothetical marketplace." CARP Report at 21.

10. Moreover, SoundExchange fails to quote, or even cite, the very next sentence following the one it repeatedly quotes. That sentence read: "Perhaps upon a showing that the record companies themselves, or even the majors, could exert oligopolistic power, we would be tempted to import the *ASCAP v. Showtime* (*see* n.10

*supra)* concept of multiple licensing collectives, each selling the same product." CARP Report at 23. This sentence makes crystal clear that (a) the CARP was deciding between two types of willing sellers – multiple licensing collectives and record companies – and (b) was of the view that, in either case, the relevant marketplace should be competitive. Otherwise, the CARP would not have expressed a willingness to reconsider its "willing seller" decision if presented with evidence that the record companies exercised market power?

11. SoundExchange next dissembles testimony by Professor Jaffe to claim that the Services conceded that a finding of "how competitive the market was" "was irrelevant to the standard the CARP set." SX PCL ¶ 38, quoting 11/8/06 Tr. 43. That is not what Dr. Jaffe said, and certainly not what the Services said. Dr. Jaffe testified:

> Q. Let's take them one at a time. Dr. Pelcovits cites the 2001 webcasting CARP. Did that CARP find the market for licenses for interactive digital transmission services, sound recording licenses, to be competitive?
>
> A No, it certainly did not. First of all, it wasn't even focused on that market. It was focused on the DMCA-compliant market. And in the DMCA-compliant market it didn't really make a finding about how competitive the market was. It made a reference in passing to evidence based basically on the same kind of HHI analysis that I've done, but based on very old data in which the HHI was 1100 rather than the 2150 that now obtains in the marketplace. So there's really nothing in that decision which supports the proposition that the interactive webcasting market is reasonably competitive.

The CARP certainly did not find an analysis of the degree of competitiveness of the hypothetical market to be "irrelevant to the {legal standard}." Rather, the CARP found that "no record evidence" had been presented to it on the issue of competition. The

CARP was statutorily required to rule "on the basis of [the] written record" presented to it. *See* 17 U.S.C. § 801(a)(1). Moreover, the issue of competition in the market for licenses to interactive services was irrelevant to the case, as nobody presented any arguments that relied upon the market for interactive services.

12. Finally, SoundExchange's claim that nothing in the DPRA, DMCA, or "their legislative history suggests that Congress believed the recording industry is insufficiently competitive" is belied by the very existence of the statutory license in the first place. As DiMA and Radio Broadcasters observed in their Joint Proposed Findings and Conclusions, it makes no sense for Congress to have created the costly and complex statutory license in the first place if it merely intended to replace one monopoly pricing structure (four labels with monopoly power over their repertoire, with whom all buyers must deal) with another (a centralized licensing mechanism). Joint D-RB PCL ¶ 38.

### B. THE PRIOR CARP AND LIBRARIAN DECISIONS DID NOT DETERMINE THAT THE SELLERS WERE THE EXISTING RECORD LABELS REGARDLESS OF THE COMPETITION AMONG THOSE RECORD COMPANIES, BUT RATHER RECOGNIZED THAT THE SELLERS MUST BE IN A COMPETITIVE MARKET.

13. SoundExchange also misrepresents the willing sellers that the CARP identified by suggesting that they are "existing record companies" regardless of how much market power those record companies exercise. SX PCL ¶ 16. For the reasons set forth in subpart A, above, the CARP made clear in both words and reasoning that the extent of market power exercised by the labels was highly relevant to its willing seller determination and could, in fact, change its determination if market power had been demonstrated. CARP Report at 23. As discussed above, the Librarian's affirmance of

the CARP's decision on this point also expressly recognized the need for a hypothetical competitive market, and the D.C. Circuit made clear its understanding that the CARP's and Librarian's decisions were based on eliminating supra-competitive fees. In short, the Web I cases simply do not support SoundExchange's position.

14. Even SoundExchange itself admits that some degree of competition is required and that "new evidence that the record companies have grown so large (or otherwise increased their bargaining power to such a degree) that their size prevents workably competitive markets in sound recording copyrights from developing or sustaining themselves" would warrant reconsideration of the willing seller question. SX PCL ¶ 47.

### C. SOUNDEXCHANGE MISCONSTRUES THE STATUTE BY ASSERTING THAT IT INVITES CONSIDERATION OF VOLUNTARY AGREEMENTS FOR RIGHTS OTHER THAN THOSE ACCORDED BY THE SECTIONS 112 AND 114 STATUTORY LICENSES.

15. SoundExchange also greatly exaggerates the legal relevance of its proffered benchmark agreements under the governing statute. It issues the sweeping pronouncement that the "most relevant benchmarks for the setting of the rates and terms in this proceeding are prices for other blanket licenses for the use of sound recordings." SX's PCL ¶ 13. It even claims that "[b]oth Sections 114 and 112 explicitly invite the Panel to consider the rates and terms negotiated under voluntary license agreements," implying that the "voluntary license agreements" referred to in the law encompass the agreements proffered by SoundExchange as benchmarks. SoundExchange's PCL ¶ 25; *see also* SX's PCL ¶ 10(a) ("Congress specified in the statute that voluntary agreements between copyright owners and digital music services were to be encouraged, 17 U.S.C.

§ 114(f)(2)(A)[ and] that such agreements are to be considered by the Judges in setting rates and terms for the statutory license, 17 U.S.C. § 114(f)(2)(B)).

16. SoundExchange has simply misread the statutory provision governing consideration of prior negotiated agreements. That provision reads:

> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

17 U.S.C. § 114(f)(2)(B) (emphasis added). The plain language of the provision refers to one type of voluntary agreement, and one type alone – agreements "described in subparagraph(A) – that is, agreements for the section 114 statutory license. Not a single label agreement proffered by SoundExchange was a statutory license agreement. Rather, each licensed different, non-statutory rights than those at issue here.

17. Moreover, the statutory language is permissive, not mandatory. The Judges "may consider" such statutory agreements if they involve comparable rights and were negotiated under comparable circumstances, but the Judges are not required to do so. *See* 17 U.S.C. § 114(f)(2)(B).

18. Importantly, the CARP, Librarian, and D.C. Circuit all summarily rejected the very type of agreements on which SoundExchange now seeks to rely as benchmarks. The CARP stated that it "rejects these agreements as useful benchmarks for the Section 114 rights at issue here" because "the record company agreements cover different rights not subject to the Section 114(f)(2) statutory license." CARP Report at 71.

19. The D.C. Circuit, on appeal, confirmed that "The CARP disregarded all of these agreements because they did not involve the same digital performance rights at

issue in the proceeding." *Beethoven.com*, 394 F.3d at 943-44. Upon review of the Librarian's summary rejection of the label agreements, the court held that "The Librarian's decision to eschew reliance on the label agreements in favor of the RIAA-Yahoo! agreement seems perfectly sensible because the label agreements ... indisputably cover rights not subject to the statutory licenses involved in this proceeding." *Id.* at 947.

20. SoundExchange also incorrectly claims that DiMA's argument logically "requires it to argue for the rejection of all contracts entered into [with] the record companies." SX PCL ¶ 22. This is the same overstated argument rejected by the CARP and Librarian in Web I. The agreements presented by SoundExchange are the agreements that DiMA and Radio Broadcasters have addressed. A finding that those agreements are not reflective of a competitive market does not irretrievably preclude others from being so—unless, that is, SoundExchange is asserting that the industry has become so non-competitive that its record company members are incapable of entering into agreements in a competitive market.

21. Finally, SoundExchange once again mischaracterizes the testimony of Dr. Jaffe as asserting that nothing in the statutory language suggests that Congress intended rates to be more competitive than real-world rates. SX PCL ¶ 20. Dr. Jaffe made clear his view that the words only made sense if they meant the fees that would prevail in a hypothetical competitive marketplace. 11/8/06 Tr. 101:4-103:4 (Jaffe).

## D. CONTRARY TO SOUNDEXCHANGE'S PREFERENCE, THE LIBRARIAN MADE CLEAR THAT THE MUSICAL WORKS BENCHMARK IS AN APPROPRIATE BENCHMARK TO CONSIDER UNDER THE FACTS OF ANY GIVEN CASE.

22. SoundExchange also is flat wrong in suggesting that the musical works benchmark should be rejected as a matter of law based on prior rulings of the Librarian and CARP. First, SoundExchange ignores that the Librarian accepted the musical works benchmark in setting fees in a 1998 section 114 proceeding. There, the Librarian expressly upheld the Register's determinations that "the marketplace license fee for the performance of the musical works" was "useful at least in circumscribing the possible range of values under consideration for the statutory performance license in sound recordings." 63 Fed. Reg. 25394, 25404 (May 8, 1998). It affirmed the Register's "determination that the value of the performance right in the sound recording does not exceed the value of the performance right in the musical works." *Id.* at 25410 (emphasis added). And in Web I, the Librarian unequivocally characterized its decision as having "adopted the rates paid for musical works fees as a relevant benchmark for setting rates for subscription services." 67 Fed. Reg. 45240, 45246-47, (July 8, 2002) (emphasis added).

23. Second, the Librarian made clear in Web I that, while the CARP had chosen an alternative benchmark over the musical works benchmark, it "[c]ertainly" had remained free to adopt the musical works benchmark and that choice of a benchmark was "a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding." 67 Fed. Reg. at 45247.

24. Third, the prior CARP itself expressly stated that, based on the facts there presented, "[a]s to the precise relative value of performance rights in sound recordings *vis-à-vis* musical works, we render no opinion." CARP Report at 41.

25. In this case, the evidence presented by both DiMA and Radio Broadcasters concerning the musical works benchmark is different from the prior proceeding in that the musical works fees relied upon as a benchmark are for the exact same activity – *i.e.*, Internet webcasting and AM/FM Streaming – as the activity at issue here. Moreover, SoundExchange's own proffered benchmarks are different from what RIAA presented in the prior webcasting proceeding, rendering the comparative benchmark analysis different. Thus, SoundExchange has no basis whatsoever to claim that "binding precedent" precludes DiMA and Radio Broadcasters from proposing a musical works benchmark, or the Copyright Royalty Judges from adopting it.

### E. CONTRARY TO SOUNDEXCHANGE'S CLAIM, *STARE DECISIS* DOES NOT DEPRIVE THE COPYRIGHT ROYALTY JUDGES OF DISCRETION TO CONSIDER PRIOR LIBRARIAN AND CARP DETERMINATIONS FOR THEIR PRECEDENTIAL VALUE BUT TO DISTINGUISH THOSE DETERMINATIONS WHERE APPROPRIATE.

26. As discussed above, the CARP and the Librarian of Congress simply did not rule in the way that SoundExchange claims they did with respect to (a) the relevant market, (b) the relevant sellers, or (c) the relevance of the musical works benchmark. Contrary to SoundExchange's claim, DiMA and Radio Broadcasters are not attempting to relitigate these issues and, to the contrary, have presented evidence and arguments entirely in keeping with those rulings. SX PCL at 13, 19.

27. In any event, the Copyright Royalty Judges are not required to slavishly apply phantom principles that prior CARPs, the Librarian or the courts bodies never considered or enunciated. Rather, the Judges have discretion to consider CARP and Librarian decisions for their precedential value and to distinguish them when the evidence, arguments, and circumstances of the particular proceeding before them so warrant. *See* H.R. Rep. 108-408, at 27 (2004) ("These decisions are not necessarily controlling, but will be considered for their precedential value and may be distinguished.").

28. SoundExchange dramatically overstates basic principles of *stare decisis.* "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tenn.* 501 U.S. 808, 828 (U.S., 1991) (quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940)). "Indeed, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Randall v. Sorrell* 126 S.Ct. 2479, 2503 (U.S., 2006) (internal quotation marks omitted). A Court, should consider whether the facts of the case have changed and would warrant a different outcome, or are distinguishable from the prior decision. If the facts are distinguishable, there is no requirement to follow the prior precedent. *See Gilbert v. N.L.R.B.*, 56 F.3d 1438, 1445 (C.A.D.C.,1995) ("where the circumstances of the prior cases are sufficiently different from those of the case before the court, an agency is justified in declining to follow them"). Moreover an agency "may distinguish precedent simply by emphasizing the importance of considerations not previously contemplated, and that in so doing it need not refer to the

cases being distinguished by name." *Envtl. Action v. FERC,* 996 F.2d 401, 411-12 (D.C.Cir.1993).

## II. DR. BRYNJOLFSSON'S FEE MODEL AND MR. GRIFFIN'S ASSERTION OF COMPETITION ARE NOT PROPER EXPERT TESTIMONY AND SHOULD BE GIVEN NO WEIGHT

29. SoundExchange relies in its Proposed Findings and Conclusions extensively on a fee model prepared by Dr. Brynjolfsson. It also relies in numerous proposed findings upon a paper by Mr. Griffin in which he selects and discusses newsletter and newspaper articles and mostly unidentified conversations with unknown individuals. *See generally* Griffin WRT. Neither meets the standards under the Federal Rules of Evidence for Expert Testimony. Although they have been admitted, they should be given little or no weight.

30. Dr. Brynjolfsson's fee model, 80-90% of which is based on his projection of advertising revenues, is entitled to no weight. His fee models border on inadmissibility under existing standards, established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (*Daubert* I), and its progeny. *See, e.g., Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) (Even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert*.").

31. Dr. Brynjolfsson relied for much of his model on projections from "AccuStream." Although he claims to have corroborated those projections with data from the services, the data from the services do not extend beyond mid-2006; the

AccuStream projections extended through 2006. Moreover, the claims of corroboration were general, and selective in nature. Dr. Brynjolfsson never re-ran his advertising fee model with data derived from discovery. Thus, his analysis remained one fundamentally premised on AccuStream.

32. Dr. Brynjolfsson testified that he had no knowledge of the underlying methodology used to form the reports 5/9/2006 Tr. 133:22-135:13, 141:1-141:6 (Brynjolfsson); 5/10/2006 Tr. 130:16-132:3 (Brynjolfsson), was wholly ignorant of the qualifications of those who put the data together (5/9/2006 Tr. 131:8-133:21 (Brynjolfsson)), lacked any information about the sources of data (5/9/2006 Tr. 133:22-134:17 (Brynjolfsson)) and how the participants were selected (5/9/2006 Tr. 135:4-9 (Brynjolfsson)), failed to validate the data in any manner prior to using it for his analysis (5/9/2006 Tr. 149:7-20 (Brynjolfsson), 5/10/2006 Tr. 130:16-132:3 (Brynjolfsson)), and failed to seek corroboration of the reported data by conducting any type of survey or query himself (5/9/2006 Tr. 136:5-11 (Brynjolfsson)). Such failure to understand and verify the accuracy of the data renders the opinions relying on this data meaningless. *See TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) (excluding document relied upon by an expert where the expert did not have any familiarity with the methods or reasoning used in the report and assumed the validity of the report without having any information on the credentials and reliability of the author of the report).

33. Further, While Rule 703 requires that evidence used as the basis of an opinion or inference be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Dr. Brynjolfsson's failure to research and establish the accuracy and validity of the AccuStream Report on which Dr.

Brynjolfsson relies, fails to meet this standard. Fed. R. Evid. 703. Where, as here, evidence has been shown to be inaccurate (5/9/06 Tr. 139:1-140:22 (Brynjolfsson)) and unreliable (5/10/2006 Tr. 128:1-12 (Brynjolfsson)), it follows that such evidence cannot be reasonably relied upon by an expert in the field. *See, e.g., ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 695 (E.D. Pa. 2003) ("[The rational of Rule 703] is certainly not satisfied . . . where the expert failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert who had a financial interest in making an accurate prediction.") (citing *TK-7 Corp.*, 993 F.2d at 732).

34. Moreover, Dr. Brynjolfsson lacks the expertise in the industry to validate the data offered in the AccuStream Reports, or to extrapolate reliably from the data contained in those reports. While a proffered expert may have skills in his field that qualify him as an expert within his purview, this does not qualify him as an expert in all fields. Prior to this litigation, Dr. Brynjolfsson lacked any experience that would allow him to opine intelligently about internet advertising rates, webcasting, or over the air radio (5/8/2006 Tr. 176:12-17, 177:3-7 (Brynjolfsson); 5/10/2006 Tr. 291:13-292:3, 295:2-14 (Brynjolfsson)). Such litigation driven opinions cannot be considered reliable. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (*Daubert* II) (considering the extent to which the testimony is motivated by the litigation as opposed to the expert's ordinary professional work); *see also O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a

completely subjective methodology held properly excluded). Accordingly, his opinion is entitled to no weight.

35. For the foregoing reasons, Dr. Brynjolfsson's fee model, based extensively on the advertising rates from an unverified AccuStream report, should be given no weight.

36. It also is a well established principle of law that expert testimony is limited to that which would assist the trier of fact without invading the province of the jury to form its own opinions and conclusions. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) ("expert testimony not only is unnecessary but indeed may properly be excluded . . . if all the primary facts can be accurately and intelligibly described to the [fact finder], and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.") (internal quotation marks omitted); *District of Columbia v. Haller*, 4 App. D.C. 405, 1894 WL 11987, at *5 (D.C. Cir. 1894) ("[w]here the subject of a proposed inquiry is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions."). In fact the text of Rule 702, incorporating a long standing common law ideal, requires that the proffered opinion of an expert, "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; *see also In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 68 (S.D.N.Y. 2001) ("As Rule 702's plain language shows, the opinion of an expert witness is only admissible if it (1) assists the trier of fact in (2) understanding the evidence or

determining a disputed fact."). If the opinion of the expert invades the role of the fact-finder it is deemed inadmissible. *See Kenney v. Washington Props., Inc.*, 128 F.2d 612, 614 (D.C. Cir. 1942) ("[I]t is only upon subjects about which the jury is not as able to judge as is the witness that an expert is allowed to express an opinion."); *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) ("Expert testimony is inadmissible when it addresses "lay matters which a jury is capable of understanding and deciding without the expert's help.").

37. Both Dr. Brynyolfsson and Mr. Griffin offered opinion testimony that violates the principles of Federal Rule of Evidence and related case law, by attempting to explain to the Judges what they are clearly capable of understanding. *See* RB PFF ¶222; *see Milwaukee & St. Paul R.R. Co. v. Kellogg*, 94 U.S. 469, 472 - 473 (1877) ("The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions."). There is nothing in either the background or education of these witnesses that would make them more capable than the Judges of understanding the contents of these exhibits, which consisted primarily of selected newspaper articles, newsletter articles, and, in some cases, documents produced in discovery in this case.

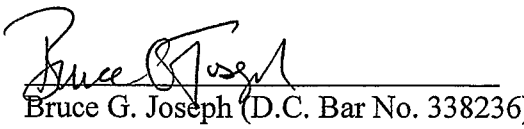
38. As Dr. Brynyolfsson and Mr. Griffin have already testified, it is not possible to deem their testimony inadmissible, however it is not to late too prevent their improper opinions from controlling the Judges' decision in this case. As their testimony does not assist the Judges in their role as fact finders and as the Judges are more than capable of forming their own opinions as the relevance and importance of the proffered

exhibits, the opinions and characterizations offered by Mr. Griffin and Dr. Brynjolfsson with respect to newspaper articles, newsletter articles, press releases, analyst reports and other such lay information, and with respect to documents exchanged during discovery, which speak for themselves, should give no weight. *See Henkel v. Varner*, 138 F.2d 934, 935 (D.C. Cir. 1943) ("[W]here the [fact finder] is just as competent to consider and weigh the evidence as is an expert witness and just as well qualified to draw the necessary conclusions therefrom, it is improper to use opinion evidence for the purpose.").

## III. PROPOSED FEE REGULATORY LANGUAGE

39. For the convenience of the Copyright Royalty Judges, Radio Broadcasters attach a draft of regulatory language implementing their fee proposal.

Respectfully submitted,



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December 20, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2006, the Public Version of Radio Broadcasters' Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law was served by e-mail and by overnight courier on the following parties:

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